

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

JUDY BOEKEN, AS TRUSTEE, ETC.,

Respondent.

**On Petition for a Writ of Certiorari to
the California Court of Appeal**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, despite this Court's holding that the Federal Cigarette Labeling and Advertising Act (15 U.S.C. §§ 1331 *et seq.*) preempts state law "failure to warn" claims, states may use a "consumer expectations" theory to impose liability for failure to provide warnings about the dangers of smoking beyond the warnings mandated by Congress.

2. Whether a \$50 million punitive damages award to a single plaintiff is unconstitutionally excessive when it is more than nine times the already substantial amount of compensatory damages and is based on purported harms to non-parties that bear no nexus to the plaintiff's injury.

RULE 29.6 STATEMENT

Petitioner's corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns ten percent or more of petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	3
I. REVIEW IS WARRANTED TO RESOLVE THE SPLIT AMONG THE LOWER COURTS AS TO WHETHER FEDERALLY MANDATED LABELING REQUIREMENTS PREEMPT "CONSUMER EXPECTATIONS" CLAIMS.	4
A. The Labeling Act Preempts "Consumer Expectation" Claims That, Like The Claims Presented Here, Are Based On The Insufficiency Of Federally Mandated Warnings.	5
B. The Lower Courts Are Split As To Whether "Consumer Expectations" Claims Are Equivalent, For Preemption Purposes, To Failure-To-Warn Claims.	8

TABLE OF CONTENTS – continued

	Page
II. CERTIORARI SHOULD BE GRANTED BECAUSE STATE COURT DECISIONS, INCLUDING THE ONE IN THIS CASE, HAVE IGNORED <i>STATE FARM'S</i> GUIDANCE REGARDING THE CONSTITUTIONAL LIMITS ON PUNITIVE AWARDS WHERE COMPENSATORY DAMAGES ARE SUBSTANTIAL.....	10
CONCLUSION	16

APPENDIX

APPENDIX A: California Court of Appeal Decision Following Rehearing	1a
APPENDIX B: Earlier California Court of Appeal Decision	79a
APPENDIX C: Trial Court Order Denying Motion For New Trial And For J.N.O.V.	155a
APPENDIX D: California Supreme Court Order Denying Review	182a

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Akee v. Dow Chem. Co.,</i> 272 F. Supp. 2d 1112 (D. Haw. 2003)	9
<i>Arnold v. Dow Chem. Co.,</i> 91 Cal.App.4th 698 (Cal. Ct. App. 2001).....	6, 10
<i>Baldwin v. Alabama,</i> 472 U.S. 372 (1985)	10
<i>Barker v. Lull Eng'g Co.,</i> 20 Cal.3d 413 (1978).....	2, 5
<i>Bates v. Dow Agrosiences LLC,</i> 125 S. Ct. 1788 (2005)	4, 7
<i>Boeken v. Philip Morris Inc.,</i> 26 Cal. Rptr. 3d 638 (Cal. Ct. App. 2005)	1
<i>Boeken v. Philip Morris Inc.,</i> No. BC 226593, 2001 WL 1894403 (Cal. Super. Ct. L.A. County).....	1
<i>Boerner v. Brown & Williamson Tobacco Co.,</i> 394 F.3d 594 (8th Cir. 2005).....	12, 13, 14
<i>Bogle v. McClure,</i> 332 F.3d 1347 (11th Cir. 2003).....	13
<i>Ceimo v. General Am. Life Ins. Co.,</i> 137 Fed. Appx. 968 (9th Cir. 2005)	14
<i>Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,</i> 450 U.S. 311 (1981)	6
<i>Cipollone v. Liggett Group, Inc.,</i> 505 U.S. 504 (1992)	2, 4, 6

TABLE OF AUTHORITIES – continued

	Page(s)
<i>Czarnik v. Illumina, Inc.</i> , No. D041034, 2004 WL 2757571 (Cal. Ct. App. Dec. 3, 2004).....	14
<i>Dow Chem. Co. v. Ebling</i> , 723 N.E.2d 881 (Ind. Ct. App. 2000).....	9
<i>Eriksen v. Mobay Corp.</i> , 41 P.3d 488 (Wash. Ct. App. 2002)	9
<i>Glassner v. R.J. Reynolds Tobacco Co.</i> , 223 F.3d 343 (6th Cir. 2000).....	6
<i>Greenberg v. Paul Revere Life Ins. Co.</i> , No. 02-16501, 2004 WL 74630 (9th Cir. Jan. 12, 2004).....	14
<i>Haddix v. Playtex Family Prods. Corp.</i> , 138 F.3d 681 (7th Cir. 1998).....	7
<i>Haggar Clothing Co. v. Hernandez</i> , No. 13-01-009-CV, 2003 WL 21982181 (Tex. Ct. App. Aug. 21, 2003).....	13
<i>Hangarter v. Provident Life & Accident Ins. Co.</i> , 373 F.3d 998 (9th Cir. 2004).....	13
<i>Henley v. Philip Morris Inc.</i> , 9 Cal. Rptr. 3d 29 (Cal. App. 2004)	15
<i>Henley v. Philip Morris, Inc.</i> , No. 995172, 1999 WL 221076 (Cal. App. Super. Apr. 6, 1999)	15
<i>Jenkins v. Amchem Prods., Inc.</i> , 886 P.2d 869 (Kan. 1994)	9
<i>Lescs v. Dow Chem. Co.</i> , 976 F. Supp. 393 (W.D. Va. 1997).....	9

TABLE OF AUTHORITIES – continued

	Page(s)
<i>Murphy v. Playtex Family Prods. Corp.</i> , 176 F. Supp. 2d 473 (D. Md. 2001)	7
<i>National Bank of Commerce of El Dorado v. Dow Chem.</i> <i>Co.</i> , 165 F.3d 602, 608 (8th Cir. 1999)	6, 7
<i>Oken v. Monsanto Co.</i> , 218 F. Supp. 2d 1361 (S.D. Fla. 2002)	9
<i>Papike v. Tambrands, Inc.</i> , 107 F.3d 737 (9th Cir. 1997)	4, 7, 8
<i>Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.</i> , 345 F.3d 1366 (Fed. Cir. 2003)	14
<i>Ruiz-Guzman v. Amvac Chem. Corp.</i> , 243 F.3d 549 (9th Cir. 2000)	8
<i>State Farm Mut. Auto Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	passim
<i>Trinity Evangelical Lutheran Church & Sch.–Friestadt v.</i> <i>Tower Ins. Co.</i> , 661 N.W.2d 789 (Wis. 2003)	13
<i>TVT Records v. Island Def Jam Music Group</i> , 279 F. Supp. 2d 413 (S.D.N.Y. 2003)	14
<i>Williams v. ConAgra Poultry Co.</i> , 378 F.3d 790 (8th Cir. 2004)	13
<i>Williams v. Philip Morris Inc.</i> , 92 P.3d 125 (Or. App. 2004)	15
<i>Zhang v. Am. Gem Seafoods, Inc.</i> , 339 F.3d 1020 (9th Cir. 2003)	13

STATUTES, RULES AND REGULATIONS

15 U.S.C. §§ 1331 <i>et seq.</i>	passim
----------------------------------------	--------

TABLE OF AUTHORITIES – continued

	Page(s)
28 U.S.C. § 1257	1
MISCELLANEOUS	
RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (2005)	5

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Philip Morris USA, respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal on rehearing (App., *infra*, 1a-78a) is reported at 26 Cal. Rptr. 3d 638 (Cal. Ct. App. 2005). The original opinion of the California Court of Appeal (App., *infra*, 79a-154a) is reported at 19 Cal. Rptr. 3d 101 (Cal. Ct. App. 2004). The Superior Court's opinion (App., *infra*, 155a-181a) is unreported but is available at 2001 WL 1894403.

JURISDICTION

The California Supreme Court denied review on August 10, 2005. App., *infra*, 182a. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. § 1334. Preemption

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

STATEMENT

Respondent Richard Boeken, a longtime smoker who contracted lung cancer, brought an action in California Superior Court (Los Angeles County) seeking damages for common-law fraud and product liability.¹ Respondent argued at trial that petitioner Philip Morris USA ("PM USA") should be held liable and punished for failing to give consumers a specific warning that the Marlboro Lights cigarettes he smoked were as dangerous as regular cigarettes. This Court held in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), that state-law failure-to-warn claims are preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.* (the "Labeling Act"). In an effort to avoid preemption, respondent therefore styled his claim as one for defective product design under California's "consumer expectations" test. That theory imposes liability on the manufacturer of any product that has "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Barker v. Lull Eng'g Co.*, 20 Cal.3d 413, 418 (1978). The "defect" here, respondent argued, was that the cigarettes "failed to perform as safely as an ordinary consumer would expect," due to petitioner's failure to warn of the health risks of Marlboro Lights. Over petitioner's objection, the jury was instructed that it could impose liability and compensatory and punitive damages on the basis of this "consumer expectations" theory.

The jury found in respondent's favor, awarding \$5.5 million in compensatory damages and **\$3 billion** in punitive damages. The trial court denied petitioner's request for a new trial, but reduced the punitive damages award to \$100

¹ For convenience, we refer herein to both Mr. Boeken and his successor as "respondent."

million, finding that “a ratio of approximately 20-to-1 is appropriate.” App., *infra*, 167a-168a.

Petitioner appealed. The Court of Appeal affirmed the liability verdict, but, relying in part on a broad range of alleged misconduct – and the harms caused by smoking in general – determined that a punitive award of \$50 million was permissible. The California Supreme Court denied review on August 10, 2005.

REASONS FOR GRANTING THE PETITION

This case raises the recurring question whether a plaintiff may evade the express preemption of state-law failure-to-warn claims by labeling the theory of liability as one for defective design under a “consumer expectations” test. The Court of Appeal deepened a preexisting conflict in authority on this issue.

In addition, this case presents a recurring question regarding the proper application of the ratio guidepost for evaluating punitive damages in cases where the compensatory damages are substantial. Following other courts that have rejected the specific guidance set forth in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Court of Appeal imposed a punitive award that is more than nine times the respondent’s massive \$5.5 million award of compensatory damages. In doing so, the court relied on allegations of unrelated harm to non-parties – thus exposing petitioner to the prospect of unfair multiple punishment – and explicitly refused to follow this Court’s instruction that where, as here, “compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost-limit of the due process guarantee.” 538 U.S. at 425. These are not isolated errors; rather, they are all too common in the wake of *State Farm*. Guidance from this Court is needed.

I. REVIEW IS WARRANTED TO RESOLVE THE SPLIT AMONG THE LOWER COURTS AS TO WHETHER FEDERALLY MANDATED LABELING REQUIREMENTS PREEMPT "CONSUMER EXPECTATIONS" CLAIMS.

Like other statutes mandating warning labels for certain products, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.* (the "Labeling Act") preempts any "requirement or prohibition based on smoking and health * * * imposed under State law with respect to the advertising and promotion of any cigarettes" carrying the federal warning labels. 15 U.S.C. § 1334. This Court has interpreted that language to preempt state-law claims, whether based on statute or common law, alleging that a cigarette manufacturer failed to warn of the health risks associated with smoking. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) (plurality); *id.* at 544 (Scalia, J. concurring in the judgment in part and dissenting in part). The Court has not, however, directly addressed the recurring question presented here.

The state court in this case allowed respondent to avoid preemption by simply recharacterizing a failure-to-warn claim as a claim that the product did not – *as a result of inadequate warnings* – meet consumer expectations regarding the health risks of the product. The court's ruling not only jeopardizes the uniform application of the Labeling Act, it also conflicts with well-reasoned decisions of the Ninth Circuit and other lower courts. See, e.g., *Papike v. Tambrands, Inc.*, 107 F.3d 737, 743 (9th Cir. 1997). The ruling is also inconsistent with several of this Court's decisions involving comparable preemption clauses, including this Court's recent decision in *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1799-1800 (2005). *Bates* held that state-law causes of action setting standards for pesticide labeling that exceed federal requirements are preempted by the Federal Insecticide, Fun-

gicide, and Rodenticide Act ("FIFRA"), regardless of the duty that state law purports to impose.

Whether defect claims predicated on consumer expectations as to health and safety are preempted is a question that has enormous ongoing importance for all manufacturers of products subject to federal preemption.

A. The Labeling Act Preempts "Consumer Expectation" Claims That, Like The Claims Presented Here, Are Based On The Insufficiency Of Federally Mandated Warnings.

The "consumer expectations" test, which is a basis for tort liability in California and many other states, imposes liability on the manufacturer of any product that has "failed to perform as safely as an ordinary consumer would expect * * *." *Barker v. Lull Eng'g Co.*, 20 Cal.3d 413, 418 (1978); see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, Reporters Note, cmt. d (2005) (citing cases from many jurisdictions). Consumer expectations are necessarily shaped by the safety warnings that accompany a product.

Indeed, respondent recognized below that his consumer expectations claim would require the jury to conclude that the manufacturer should have given warnings *in addition to* the federally mandated warnings accompanying petitioner's product. Thus, at trial, respondent had to argue, and did argue, that Marlboro Lights were defective in design because petitioner *failed to warn* smokers that those cigarettes may not actually deliver lower tar to a smoker who "compensates" for the cigarette's lower nicotine yield by "adjust[ing] the way he or she smokes in order to get a satisfying amount of nicotine * * *." In closing argument, respondent's counsel had to argue, and did argue, that petitioner's low-tar cigarettes defied consumers' expectations because petitioner *failed to warn* smokers not to "puff so deep, don't take to[o] much puffs, don't cover up those [ventilation] holes."

On appeal, respondent continued to make clear that he challenged the adequacy of the warnings. Respondent argued that the product liability verdicts were based on allegations that petitioner “*never informed consumers*” of the health risks associated with smoking Marlboro Lights. Respondent’s Brief to the California Court of Appeals, filed Mar. 12, 2003, at 43 (emphasis added).²

Respondent’s argument necessarily challenged the sufficiency of the federally mandated warning labels on Marlboro Lights cigarettes as inadequate to inform consumers of the health risks of the product. Nevertheless, the Court of Appeal dismissed petitioner’s argument that the claim was preempted by the Labeling Act, ruling that “[p]roduct liability under a failure-to-warn theory is a distinct cause of action from one under the consumer expectation test,” and that the latter was not preempted. App., *infra*, 29a (citing *Arnold v. Dow Chem. Co.*, 91 Cal.App.4th 698 (Cal. Ct. App. 2001)).

This Court has explained that, under the FCLAA, any tort claim based on nondisclosure to consumers of health risks is a “prohibition” with respect to “smoking and health” and is therefore preempted by the Labeling Act, regardless of whether that claim is expressly asserted under the rubric of “failure to warn.” *Cipollone* makes it “necessary to look beyond the labels attached to plaintiff’s common law claims and, instead, to evaluate each claim to determine whether it was in fact preempted.” *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 347 (6th Cir. 2000). See also *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) (preemption “cannot be avoided by mere artful pleading.”); *National Bank of Commerce of El Dorado v.*

² Petitioner first introduced Marlboro Lights cigarettes in 1971, and every package of those cigarettes has carried the federally mandated warning. Thus, any alleged failure to include additional warnings about Marlboro Lights necessarily occurred after the Labeling Act took effect in 1969.

Dow Chem. Co., 165 F.3d 602, 608 (8th Cir. 1999) ("It is immaterial whether an inadequate labeling or failure to warn claim is brought under a negligence or products liability theory. If a state law claim is *premised* on inadequate labeling or failure to warn, the impact of allowing the claim would be to impose an additional or different requirement for the label or packaging.") (emphasis in original) (footnote omitted).

The consumer expectations claim in this case depended exclusively on respondent's allegation that PM USA had a duty to provide additional warnings with its low-tar cigarettes, despite the fact that those cigarettes were stamped with the federally mandated warning as to the health risks of smoking. A tort action that imposes liability based on the theory that consumers expect the product to be safer than indicated in the federally-mandated warnings necessarily challenges the sufficiency of the labels. As the Ninth Circuit reasoned, it would be "anomalous" to hold "that a consumer is entitled to expect a product to perform more safely than its government-mandated warnings indicate." *Papike*, 107 F.3d at 743. See also *Haddix v. Playtex Family Prods. Corp.*, 138 F.3d 681, 686 (7th Cir. 1998) ("We agree with the analysis of the Ninth Circuit [in *Papike*]."); *Murphy v. Playtex Family Prods. Corp.*, 176 F. Supp. 2d 473 (D. Md. 2001) ("Under such circumstances [where the manufacturer provides warning labels], an ordinary consumer would expect to be exposed to the risk of TSS associated with Tampon use."), *aff'd*, 69 Fed. Appx. 140 (unpub.) (4th Cir. 2003).

More recently, in *Bates*, this Court reaffirmed that federal preemption turns on the inherent nature of the plaintiff's claim, not on how that claim is styled. Relying on *Cipollone*, the Court held that state-law causes of action setting standards for pesticide labeling that exceed federal standards are preempted by FIFRA, regardless of the duty that the state law in question purports to impose. See *Bates*, 125 S. Ct. at 1799-1800 (fraud and negligent failure-to-warn claims are preempted if they "set a standard for a product label that the

[pesticide] is alleged to have violated by containing false statements and inadequate warnings”).

This approach is consistent with Congress’s purpose in including a preemption provision in connection with its warning requirement: to keep the public “adequately informed about any adverse health effects of cigarette smoking” while ensuring that the national economy was not “impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations.” 15 U.S.C. § 1331. Put simply, because the Labeling Act was intended to prevent nonuniform regulation of cigarettes by individual states, a tort claim is preempted where, to avoid liability, a cigarette manufacturer would have no choice but to provide warnings concerning smoking and health beyond those required by federal law.

The Court of Appeal decision here represents a departure from the authorities construing preemption clauses like that in FCLAA as barring “failure to warn” claims brought under a variety of legal labels. This Court should grant review to ensure the uniformity intended by the Labeling Act.

B. The Lower Courts Are Split As To Whether “Consumer Expectations” Claims Are Equivalent, For Preemption Purposes, To Failure-To-Warn Claims.

The Court of Appeal’s decision deepens a clear and pervasive conflict on the important question whether claims based on “consumer expectations” are preempted by federally mandated labeling requirements. The Ninth Circuit, for example, has answered that question in the affirmative. See, e.g., *Papike v. Tambrands, Inc.*, 107 F.3d 737, 743 (9th Cir. 1997) (a consumer is not “entitled to expect a product to perform more safely than its government-mandated warnings indicate”); *Ruiz-Guzman v. Amvac Chem. Corp.*, 243 F.3d 549 (9th Cir. 2000) (“We agree with the district court that FIFRA preempts Washington’s consumer expectation test.”)

(unpublished). This is the position taken by the majority of courts to have considered the issue.³ California state courts, however, have embraced the persistent minority view allowing plaintiffs to circumvent the preemption established by federal law by simply relabeling their claims.⁴ In holding

³ See *Akee v. Dow Chem. Co.*, 272 F. Supp. 2d 1112, 1132 (D. Haw. 2003) ("In this case, the Court finds that Plaintiffs are foreclosed from establishing a strict liability design defect claim through use of the consumer expectations test, because such a claim is preempted by FIFRA."); *Oken v. Monsanto Co.*, 218 F. Supp. 2d 1361, 1366 (S.D. Fla. 2002) ("Defendants argue that any Florida jury considering strict liability under either test would necessarily need to determine, under an objective test, whether the label or package warnings were reasonable to an ordinary consumer. * * * This Court agrees. * * * The objective expectation of the public regarding the dangerousness of a product necessarily involves consideration of the warning given to the public."), *aff'd*, 371 F.3d 1312 (11th Cir. 2004), vacated and remanded by 125 S. Ct. 1968 (2005); *Lescs v. Dow Chem. Co.*, 976 F. Supp. 393, 399 (W.D. Va. 1997) ("For this court to allow a claim of defective design based on consumer expectations would represent an unwarranted end-run around federal preemption."), *aff'd*, *Lescs v. William R. Hughes, Inc.*, 168 F.3d 482 (4th Cir. 1999) (unpub.), cert denied, 528 U.S. 1119 (2000); *Jenkins v. Amchem Prods., Inc.*, 886 P.2d 869 (Kan. 1994) (treating consumer expectations claim as equivalent to negligent failure to warn and finding it preempted); *Eriksen v. Mobay Corp.*, 41 P.3d 488, 495 (Wash. Ct. App. 2002) ("We affirm the trial court's summary judgment order holding that Mr. Eriksen's [consumer expectations] claim against Bayer is preempted by the FIFRA.");

⁴ See *Arnold v. Dow Chem. Co.*, 91 Cal.App.4th 698, 717 (Cal. Ct. App. 2001) ("Our Supreme Court has expressly established the consumer expectations test as a theory independent from a failure-to-warn cause of action, and we conclude that appellants have alleged such a distinct cause of action."); see also *Dow Chem. Co. v. Ebling*, 723 N.E.2d 881, 902 (Ind. Ct. App. 2000) ("Papike * * * provides no support for the conclusion that a 'consumer expecta-

that respondent's consumer expectations claim was not preempted in this case, the Court of Appeal relied on *Arnold*, a FIFRA preemption case that expressly rejected the Ninth Circuit's analysis in *Papike*. See 91 Cal.App.4th at 725-26. This conflict between the Ninth Circuit and the California state courts is particularly troublesome because it will encourage forum shopping and will produce different results based on nothing more than whether a particular lawsuit is removable. For that reason, this Court has held that a conflict between state and federal appellate courts in the same state is a compelling reason to grant review. See *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985).

If this split in authority is not resolved, the risk of massive compensatory and punitive liability will force cigarette manufacturers to provide "diverse, nonuniform and confusing" warnings for their low tar cigarettes, contrary to express congressional purpose. 15 U.S.C. § 1331. Only guidance from this Court can produce the consistency FCLAA was designed to provide.

II. CERTIORARI SHOULD BE GRANTED BECAUSE STATE COURT DECISIONS, INCLUDING THE ONE IN THIS CASE, HAVE IGNORED STATE FARM'S GUIDANCE REGARDING THE CONSTITUTIONAL LIMITS ON PUNITIVE AWARDS WHERE COMPENSATORY DAMAGES ARE SUBSTANTIAL.

In *State Farm*, this Court provided the lower courts with concrete guidance regarding the reasonable relationship that punitive damages must bear to a plaintiff's harm. It explained that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant

tion' design defect claim is preempted by FIFRA."), *aff'd* in relevant part, 753 N.E.2d 633 (Ind. 2001).

degree, will satisfy due process" and reiterated that a punitive award of four times compensatory damages generally "might be close to the line of constitutional impropriety." The Court stated that the long history of statutory double, treble, and quadruple damages remedies (ratios of 1:1 to 3:1) is "instructive" and concluded that where – as here – "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added).

Here the Court of Appeal awarded \$50 million in punitive damages, an amount more than *nine* times the unquestionably substantial \$5.5 million compensatory award. In doing so, the Court of Appeal explicitly rejected this Court's reasoning that the ratio should decrease as the compensatory award against the defendant reaches a substantial amount:

In the end, this argument leads to the unsupportable proposition that those who commit the most devastating and reprehensible wrongs are given caps on their punitive damages exposure which those who commit lesser wrongs do not receive – a proposition standing the legitimate and necessary role of punitive damages on its head.

App., *infra*, 68a (quotation marks omitted).

It is the California Court of Appeal, however, that has turned this Court's holding in *State Farm* upside down by refusing to recognize that a \$5.5 million compensatory award itself has a substantial deterrent effect even before the addition of punitive damages. First, as was the case in *State Farm*, see 538 U.S. at 426, the compensatory award here included a large component (\$3.25 million) of non-economic, quasi-punitive damages. Moreover, the compensatory award of \$5.5 million is unquestionably "substantial," and it cannot be denied that the award will "fully compensat[e]" for respondent's injuries. In light of those circumstances and the

concrete prospect that other courts – indeed, other California courts – may impose similarly large compensatory and punitive awards on petitioner for the same conduct alleged here, a ratio of 9:1 is manifestly excessive.

The Court of Appeal focused on what it described as the high reprehensibility of petitioner's conduct, but, in violation of *State Farm*, relied heavily on harms to non-parties that bear no reasonable nexus to the conduct at issue in this single-plaintiff case. The court cited numerous statistics that had nothing whatever to do with the specific misconduct alleged by respondent. For example, the court stated that "second-hand smoke kills 3,000 non-smoking Americans annually," despite the fact that second-hand smoke was not even remotely related to any issue in the case: respondent was a smoker. The court went on to emphasize that "of the people who die every year in this country from smoking-related disease, 200,000 are attributable to Philip Morris products." App., *infra*, 63a-64a. General statistics about smoking-related disease have nothing to do with any product defect or fraud; they are not tied to any wrongdoing at all, let alone the particular allegations in this case.

The Court of Appeal's holding is in direct conflict with that of the Eighth Circuit in *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), a case in which the plaintiff made a design defect claim against another cigarette manufacturer. In *Boerner*, the jury awarded plaintiff \$4,025,000 in compensatory damages and \$15 million in punitive damages – a ratio of less than 4:1. On appeal, the Eighth Circuit characterized the defendant's misconduct as "highly reprehensible": it found that the defendant had "actively misled consumers about the health risks associated with smoking" and had exhibited "a callous disregard for the adverse health consequences of smoking," which led to plaintiff's "most painful, lingering death following extensive surgery." *Id.* at 603. Nonetheless, the court also held that the substantial compensatory damages awarded by the jury ren-

dered the punitive damages award excessive. The court reduced the punitive damages to \$5 million: "given the \$4,025,000 compensatory damages award in this case, we conclude that a ratio of approximately 1:1 would comport with the requirements of due process." *Ibid.*; see also *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing punitive award to 1:1 ratio in light of \$600,000 compensatory damages award).

In contrast to *Boerner*, but in keeping with the Court of Appeal's opinion here, many other lower courts have systematically misapplied the ratio guideline, often assuming that any single-digit ratio is generally immune from constitutional scrutiny and consistently ignoring the Court's guidance regarding the proper ratio when compensatory damages are substantial. See, e.g., *Hangerter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014 (9th Cir. 2004) ("State Farm's 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be."); *Haggar Clothing Co. v. Hernandez*, No. 13-01-009-CV, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 21, 2003, pet. filed) (focusing exclusively on Court's reference to single-digit ratios in upholding 6.7:1 ratio where compensatory damages were \$210,000); *Trinity Evangelical Lutheran Church & Sch.-Friestadt v. Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis. 2003) (concluding that actual damages resulted in 7:1 ratio and assuming, without discussion, that 7:1 ratio satisfies due process), *cert. denied*, 124 S. Ct. 925 (2003); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) ("We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case."), *cert. denied*, 124 S. Ct. 1602 (2004); *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (4:1 ratio "does not indicate that the punitive damages award violates due process" even though compensatory award of \$500,000 was "substantial"), *cert. dismissed*, 124 S.

Ct. 1168 (2004); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1371-72 (Fed. Cir. 2003) (affirming \$50 million punitive award that was more than three times the \$15 million compensatory award as "not even reaching the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect"), cert. denied, 124 S. Ct. 1423 (2004); *Greenberg v. Paul Revere Life Ins. Co.*, No. 02-16501, 2004 WL 74630, at *2 (9th Cir. Jan. 12, 2004) (unpublished) ("The 4.4:1 ratio between the compensatory and punitive awards in this case is similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities."). These decisions and many others have vastly oversimplified this Court's decision in *State Farm*, assuming that any single-digit ratio will be permissible in all cases; and ignoring (or, as here, expressly rejecting) the clear implication of *State Farm* that a 4:1 ratio will be the *limit* in most cases and that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial.

Indeed, of the 58 post *State Farm* decisions reviewing a punitive award in which the compensatory award or potential harm has exceeded \$500,000 (and thus is indisputably "substantial"), only a small fraction have heeded the instruction that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." See *Boerner*, 394 F.3d at 603; *Williams*, 378 F.3d at 799; *Ceimo v. General Am. Life Ins. Co.*, 137 Fed. Appx. 968 (9th Cir. 2005) (affirming district court's reduction of \$79 million punitive award to \$7 million where compensatory damages were approximately \$6.7 million); *Czarnik v. Illumina, Inc.*, No. D041034, 2004 WL 2757571 (Cal. Ct. App. Dec. 3, 2004) (unpub.) (reducing punitive award to 1:1 in light of \$2.2 million compensatory damages award); *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 450-51 (S.D.N.Y. 2003) (reducing punitive award to 1.2:1 in light of

\$24 million compensatory award), vacated on other grounds, 412 F.3d 82 (2d Cir. 2005).

It is simply untenable, after *State Farm*, to assert that an award producing a ratio of greater than 9:1 comports with due process in this case, especially in light of the substantial compensatory damages imposed against petitioner and the concrete prospect that other courts – indeed, other California courts – may continue to impose similarly large compensatory and punitive awards on petitioner for precisely the same conduct that the court relied on here. See *State Farm*, 538 U.S. at 423 (warning that courts must be wary of the “possibility of multiple punitive damages awards for the same conduct”).

The due process concerns arising from the state court’s approach here are not merely hypothetical. Many similar lawsuits are pending. Petitioner recently paid a \$10.5 million verdict, including \$9 million in punitive damages, to a single smoker who was allowed to urge the jury to punish for alleged harm to non-parties – a group that included Mr. Boeken. See *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 70-72 (Cal. App. 2004), cert. denied, 125 S. Ct. 1640 (2005); see also *Henley v. Philip Morris, Inc.*, No. 995172, 1999 WL 221076 (Cal. App. Super. Apr. 6, 1999) (“The credible evidence showed that over 450,000 Americans die each year from cigarette-related disease, that almost 180,000 Americans die each year from lung cancer, and that cigarette smoking is the major cause of lung cancer.”), aff’d 9 Cal. Rptr. 3d (Cal. App. 2004) (remitting punitive award on other grounds); see also *Williams v. Philip Morris Inc.*, 92 P.3d 126 (Or. App.) (after GVR in light of *State Farm*, affirming \$500,000 compensatory award and \$79.5 million punitive award against petitioner in case brought by individual smoker), review allowed 193 Or. App. 527 (Or. 2004).

While this case, given the large dollar amounts, is an egregious instance of lower-court disregard for this Court’s

due process jurisprudence, the same constitutional violation recurs with great frequency in punitive damage cases throughout the country. Given the lower courts' systematic misapplication of the *State Farm* guidelines in cases where compensatory damages are substantial and the Court of Appeal's refusal to account for the concrete prospects of multiple punishment in this case, further guidance from this Court is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2005

APPENDICES

APPENDIX A

Filed 4/1/05 Opinion following rehearing.

CERTIFIED FOR PUBLICATION

**IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA**

SECOND APPELLATE DISTRICT

DIVISION FOUR

JUDY BOEKEN, as Trustee, etc.,
Plaintiff and Respondent,

v.

PHILIP MORRIS
INCORPORATED,
Defendant and Appellant.

B152959

(Los Angeles County
Super. Ct. No.
BC226593)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles W. McCoy, Jr., Judge. Affirmed as Modified conditioned upon acceptance of Remittitur.

Arnold & Porter, Murray G. Garnick, Robert A. McCarter, Ronald C. Redcay and Maurice A. Leiter for Defendant and Appellant.

Michael J. Piuze for Plaintiff and Respondent.

BACKGROUND

Richard Boeken filed this action on March 16, 2000, alleging various theories including negligence, strict product liability and fraud resulting in personal injuries caused by his

cigarette addiction.¹ The complaint alleges that Boeken began smoking in 1957, when he was a minor, that he smoked Marlboro and Marlboro Lights, both manufactured by Philip Morris USA, Inc., and that he was ultimately diagnosed with lung cancer in 1999.

The cause was tried to a jury over approximately nine weeks, beginning in March 2001. The jury found that Philip Morris products consumed by Boeken were defective either in design or by failure to warn prior to 1969, resulting in injuries to Boeken. The jury also found liability to Boeken based upon fraud by intentional misrepresentation, fraudulent concealment, false promise, and negligent misrepresentation, concluding that Boeken had justifiably relied upon fraudulent utterances and concealment by Philip Morris. Compensatory damages in the amount of \$5,539,127 were awarded by the jury. It also assessed punitive damages in the sum of \$3 billion dollars.

A Philip Morris motion for judgment notwithstanding the verdict was denied. Its motion for new trial was conditionally granted solely on the issue of punitive damages unless Boeken accepted a reduction in punitive damages to the sum of \$100 million, in which case the motion was denied. Boeken consented to the reduction and an amended judgment was entered on September 5, 2001. Philip Morris and Boeken each filed timely notices of appeal.

We issued our first opinion on September 21, 2004, affirming the judgment but further reducing punitive damages to the amount of \$50 million. Philip Morris and Boeken each filed petitions for rehearing, which we granted. We heard fur-

¹ Since Philip Morris and Boeken have both appealed, we shall refer to them by name. Richard Boeken has died, but we shall continue to refer to respondent and cross-appellant as Boeken, since his successor in interest is his widow of the same name, Judy Boeken, trustee for the Richard and Judy Boeken Revocable Trust.

ther argument on February 15, 2005. After reconsidering the issues raised by the parties, we again affirm the judgment and order reduction of punitive damages to \$50 million, if Boeken accepts the remittitur. If he does not, we affirm the order of the trial court granting a new trial to Philip Morris on the issue of punitive damages.

EVIDENCE REGARDING SMOKING, ITS EFFECTS AND THE FALSE CONTROVERSY²

Physicians had the ability in the mid-nineteenth century to diagnose lung cancer. It was a rare disease until some years after the first commercial pre-rolled cigarettes were introduced in the United States in 1913. In the 1930s, there was a sharp increase in the number of cases diagnosed, and by the end of World War II, its incidence had increased 20-fold.

Boeken's epidemiological expert, Dr. Richard Doll, joined Professor Bradford Hill at the London School of Hygiene in the late 1940s, to conduct the first studies in the United Kingdom to determine the cause of lung cancer, and why its incidence had increased so dramatically. Statistics established a causal connection between smoking and cancer, and Doll and Hill published their results in 1950 in the *British Medical Journal*.³

A Dutch scientist had published a paper in 1948, having reached the same results, and in 1950, a smaller American study was published in the *Journal of the American Medical Association* by American scientists, Drs. Graham and Wyn-

² Because Philip Morris challenges the sufficiency of the evidence on various issues, we set out the facts in the light most favorable to the judgment. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

³ Doll has been awarded many honors over the years for his work on tobacco, including knighthood in 1971.

der, also reaching the same conclusion. There had been earlier studies in Germany, but they were not given much weight because the scientific methods used were not optimal.

The popular media and the UK Department of Health were not convinced by the Hill and Doll study, and so the two undertook a years-long study of 40,000 smoking and non-smoking English doctors who did not have lung cancer. They thought it would take 5 years to complete the study. But in 1954, after two years and 35 deaths due to lung cancer, they felt the results were clear and published their findings immediately in the *British Medical Journal*. This study was more widely accepted than the previous studies and changed attitudes considerably.

The American Cancer Society then undertook a two-year study with 190,000 subjects, in order disprove Doll's conclusions. In 1954, its scientists reported their belief that the conclusions reached in British study had been correct. Even after publication of Doll's second study and the American Cancer Society study, some leading scientists still questioned the link between lung cancer and smoking, and opinion among scientists was evenly divided until about 1956. At that time, opinion had firmed up quite definitely among scientists that smoking caused lung cancer.

Neil Benowitz, M.D., Boeken's addiction expert, testified that nicotine is addictive, and the most effective way addiction is achieved is delivery by cigarette smoke.⁴ Withdrawal

⁴ More specifically, Benowitz testified that nicotine is similar to a hormone called acetylcholine (ACH), which is responsible for nerve communication, and is highly concentrated in the brain. ACH binds to receptors which release other hormones that affect mood and behavior. Nicotine attaches to the same receptors, but in larger amounts, and activates them to a greater extent. Nicotine becomes necessary for the brain to function normally. Smoking creates an aerosol, and when the gas goes directly to the lungs, it delivers the nicotine instantly to the heart and brain, achieving its

symptoms include irritability, anxiety, insomnia, trouble concentrating, nervousness, and dysphoria (mild depression), and can last for months after quitting. Some symptoms last forever. Smokers use denial and rationalization to continue doing what is obviously or apparently harming them and may acknowledge a general risk, but given a choice of conflicting opinions, they will choose the opinion that supports continued tobacco use.

In 1954, the tobacco industry embarked upon a decades-long strategy to create public doubt about the "health charge" through "vigorous" but not actual denial, such as by claiming that experimental proof was still lacking, and that the statistics were not to be trusted, because they were poorly obtained or grossly exaggerated.⁵

First, several tobacco companies, including Philip Morris, formed the Tobacco Industry Research Committee (T.I.R.C.), a public relations organization, to counter the "anti-cigarette crusade" by providing "balancing information" regarding "unproven facts."⁶ To announce its formation, it published "A Frank Statement" in newspapers across the country. The "Frank Statement" claimed: "Distinguished authorities point out ... that there is no proof that cigarette smoking is one of

effect within 15 seconds. This immediate reinforcement encourages addiction. Thus, the smoking (of any addictive substance) is the delivery system that causes the fastest addiction.

⁵ Philip Morris's knowledge and actions were shown by the testimony of several former employees of the research and development department, which operated several laboratories, and by a series of internal memoranda between company officers assigned to the labs in the 1950s through the 1980s, including Helmut Wakeham, William L. Dunn, T.S. Osdene, and Robert B. Seligman.

⁶ At some time in the late 1950s or early 1960s, the Council for Tobacco Research (CTR) replaced the T.I.R.C.

the causes [of lung cancer] [and] statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed, the validity of the statistics themselves is questioned by numerous scientists."⁷

According to Dr. Doll, the Frank Statement was a "bald untruth." While some scientists had questioned the link, most knew at the time of the Frank Statement that smoking caused lung cancer.

Tobacco studies continued throughout the 1950s in many countries, including Japan, Denmark, and France. In 1957, the United States Heart and Lung Institute, the National Cancer Institute, National Institute of Health, and American Cancer Society appointed a joint committee to advise on the state of the science, and concluded that smoking was a cause of lung cancer. The Auerbach study, published in 1957, showed pictures of various stages to demonstrate how the risk of lung cancer increased after a certain number of years of smoking.

In 1960, the World Health Organization issued a report stating that smoking was a cause of lung cancer, and an editorial in the *New England Journal of Medicine* stated that no responsible observer could deny the association. Scientists did not yet know what specific substance in cigarette smoke caused lung cancer, but it was proven by 1953 that cigarette smoking caused it by some means, and by 1960, it was indisputable.

⁷ The Frank Statement also assured the public that the industry was concerned about the possible health effects of tobacco and was researching the question, and promised that it would inform the public immediately if it found smoking tobacco to be harmful. The promise was false. Philip Morris's own expert, Dr. Carchmann, testified that the tobacco industry did not publicly admit that smoking was harmful until approximately 2000.

Nevertheless, Philip Morris and other tobacco companies continued their campaign of doubt. T.I.R.C. continued its work, issuing press releases, making personal contacts with journalists, providing "favorable" materials for editorials, articles, and columns, and providing assistance to the authors of such books as *You Don't Have to Give up Smoking* and *Smoke Without Fear*.

A 1957 T.I.R.C. press release quoted its chairman and scientific director as saying, "No substance has been found in tobacco smoke known to cause cancer in human beings." The statement was literally true in that the specific mechanism in cigarettes that caused lung cancer was still unknown, but it was misleading, because the cause and effect had been proven.

In the late 1950s, Philip Morris and other tobacco companies formed another trade organization, the Tobacco Institute, to speak on their behalf. The Tobacco Institute issued press releases, such as the 1961 "Tobacco Institute Statement," which asserted, among other things, "The repetition by Dr. Wynder of his firm opinions does not alter the fact that the cause or causes of lung cancer continue to be unknown and are the subject of continuing extensive scientific research by many agencies." And a 1962 press release sent to CBS protesting a program on youth smoking stated, "causes of lung cancer are still unknown."

The statements were false. In 1961, there were a few other established causes of lung cancer, such as asbestos, but the affected industries were taking precautions to protect people from exposure. Ninety percent of lung cancers were shown to be caused by tobacco. There was no cancer researcher at that time who would say that the causes of lung cancer continued to be unknown.

In 1965, the Tobacco Institute issued a press release based upon the "Genetic Theory" of well-known statistician Ronald Fisher, who opined that there was a genetic factor

that caused people to want to smoke and that made them susceptible to lung cancer. That theory had been repudiated in studies in the 1950s in Sweden, the United States, and Finland. The press release also referred to the "smoking theory" of lung cancer, even though no serious scientific researcher considered it a legitimate scientific concept in 1965. The United States Surgeon General had already reported the link in 1964.

In the 1950s, the major cigarette companies, including Philip Morris, entered into a "gentlemen's agreement" not to present products they marketed as "tested for safety," or to use test results to compete, such as by claiming that one company's cigarette has produced less cancer in rats, and not to do animal testing with regard to cancer. The agreement was in place throughout the 1960s.⁸

In the 1960s, Congress conducted hearings prior to enacting the Public Health Cigarette Smoking Act of 1969. (E.g., 15 U.S.C. §§ 1331, et seq.)⁹ In March 1965, the Tobacco Institute issued a press release in which it described, among other things, the testimony of R.J. Reynolds president Bow-

⁸ In prior testimony read to the jury, Dr. Jan Uydess established that Philip Morris set up a laboratory in Germany to conduct health-related studies, such as on emphysema and toxicity, and effects on animal systems. Philip Morris did not do the research in the United States, because issues relating smoking to health and addictiveness were considered to be very sensitive. The reports from the German lab were sent to senior Philip Morris scientist T.S. Osdene at his home, and he would destroy them after reading them.

⁹ We shall hereinafter refer to this statute either as the Public Health Cigarette Smoking Act of 1969 or simply as the 1969 Act. The 1969 Act required a health warning on every package of cigarettes sold in the United States. (15 U.S.C. § 1333; see generally, *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 515-518, 525 (*Cipollone*), discussed within.)

man Gray before Congress on behalf of cigarette manufacturers, including Philip Morris, in opposition to the proposed legislation. Gray told Congress that many scientists held the opinion that it had not been established that smoking caused lung cancer or any other disease; that there was a very high degree of uncertainty; and that a great deal more research was necessary before definitive answers could be given.

By the 1950s, tar was and still is thought to contain most of the organic materials that are likely to cause cancer. When cigarettes were unfiltered and contained large particulate matter, they were irritating, which kept smokers from inhaling deeply. The growing use of filtered cigarettes in the 1960s reduced the amount of delivered tar from about 35 to 25 milligrams, and was thought to reduce the risk somewhat, but filters and flavorings, which act as bronchodilators, made cigarettes easier to smoke. The benefits came in the 1950s and 1960s, which saw a reduction from the 35 milligrams in the 1930s, to 25 milligrams. But there has been no benefit from a further lowering of tar beginning in the 1980s to 10 or 15 milligrams. And further reduction of tar in the so-called low-tar or "light" cigarettes has not resulted in a safer cigarette. It has affected only the *location* of lung cancers and the type of cancer that may be contracted.

It has been generally known since the late 1800s that it is difficult to quit smoking. Scientists have known that nicotine is addictive since the 1920s, although the how and the why came later. At the time of the first Surgeon General's report in 1964, however, many thought that in order to be truly addictive, a substance had to be intoxicating, to have a severe withdrawal syndrome, and to be associated with antisocial behavior, such as criminality. The 1964 Surgeon General's report defined drug addiction as "a state of periodic or chronic intoxication produced by the repeated consumption of a drug." Since tobacco was extremely difficult to quit, but was not intoxicating and did not involve anti-social behavior, the Surgeon General used the term "habituation."

In 1965, the World Health Organization discarded the term "habituation" in favor of "dependence," which encompassed addiction, and "addiction" and "dependence" were generally used interchangeably after that to mean any compulsive drug use. *Dependence* was defined as giving the use of a substance a higher priority than other things important to the user, like money or health. The intoxication element became obsolete, and *habituation* fell into disuse. By 1988, the Surgeon General's report dropped *addiction*, whether to intoxicating drugs or nicotine, in favor of *dependence*. But the tobacco companies continued urging obsolete terminology through misleading statements to the public, according to Benowitz.

Internal memoranda demonstrate that as early as 1959, Philip Morris recognized that "[o]ne of the main reasons people smoke is to experience the physiological effects of nicotine on the human system"; and that Philip Morris researchers knew no later than 1959 that addiction was a probable reason why people smoked. A 1969 memorandum shows that Philip Morris's scientists recognized that nicotine was a drug, but feared regulation by the Food and Drug Administration should this knowledge become public.¹⁰

Dr. William Farone, who testified for Boeken, was hired in the mid-1970s by Philip Morris for his expertise in colloid chemistry, which relates to aerosols, such as smoke. It was

¹⁰ Philip Morris attorneys were concerned that research amounting to tacit acknowledgement that nicotine was a drug would be "untimely" because of a legislative effort to transfer authority over tobacco to the FDA. In a 1980 internal memorandum, Robert B. Seligman, Osdene's successor as vice president of research and technology, suggested that Philip Morris continue to study the "drug nicotine" to stay abreast of developments with an active research program, but cautioned, "we must not be visible about it," since the attorneys would "likely continue to insist upon a clandestine effort."

commonly understood among the Philip Morris scientists at the time he arrived at its laboratory in 1976, that nicotine was addictive. On several occasions, Dr. Osdene described his mission as one to "maintain the controversy," which Farone understood to mean creating doubt whether nicotine was addictive and whether smoking caused disease.

An internal memorandum shows that by 1972, Philip Morris recognized that the more nicotine a cigarette delivered, the greater its market. By then, the Marlboro brand was outselling the popular brands of earlier years.¹¹ A competitor, R.J. Reynolds, conducted a study to determine why, and found that the pH of Marlboro smoke was much higher than that of the smoke from any of its brands. The higher the pH in cigarette smoke, the more free-base nicotine is delivered to the smoker. Ammonia raises the pH level, and occurs naturally in tobacco. But Philip Morris added urea to Marlboro tobacco to increase the release of ammonia into the smoke.

In 1977, when Philip Morris scientist Carolyn Levy began to study the effects of nicotine withdrawal, her supervisor, W.L. Dunn, suggested to Osdene that he should "bury" any results, should they show similarities to morphine and caffeine. According to Farone, in 1984 Philip Morris shut down some of its research programs in order to eliminate research that could show that cigarettes were addictive or that could prove that they cause cancer. Senior management no longer wanted to do research that could be used against Philip Morris.

Paul Mele, Boeken's expert in behavior pharmacology, with additional training in the area of drug abuse, testified that he was employed by Philip Morris from 1981-1984. Philip Morris employed him to work in its secret laboratory where rat studies were conducted in an attempt to identify a

¹¹ Marlboro is still the best selling brand in this country.

nicotine substitute that would eliminate the adverse cardiovascular effects, but still keep people smoking.

A nicotine substitute would have to bind in the same area of the brain and produce the same effects on brain tissue, but Mele and his coworkers were told never to use the words, "drug" or "addiction."¹² Thus, they euphemistically concluded that rats "will work for" nicotine in the same way that they will work for cocaine or heroin. But the question of addiction or dependence was never in doubt, and their research goal was not to prove or disprove addiction, but to find compounds that would substitute for nicotine, in case nicotine were ever banned.

Dr. Mele wanted to publish a paper on nicotine tolerance during the time he worked for Philip Morris but his superiors would not permit it. He was told the research demonstrated that nicotine was a "dependence producing substance" within the definition of the Diagnostic and Statistical manual of the American Psychiatric Association, and that it would not be acceptable to the company to have this known by the public. During this period, he heard a Philip Morris officer, Jim Remington, say, "We all know it is addicting, it's addicting as hell. And our real concern is stopping these anti-smoking people outside the gates."

With this evidence in mind, we now turn to a discussion of the issues raised on appeal. We will include further evidence from the record relevant to the specific issues addressed.

¹² The term *cancer* was not to be used either; they referred to it as "biological activity."

DISCUSSION

1. *Boeken's Reliance*

Philip Morris contends there is insufficient evidence to support a finding of reliance by Boeken on any false statements or nondisclosures to support the jury's verdict on fraud. In particular, Philip Morris contends that the evidence was insufficient to prove that Boeken was aware of *specific* misrepresentations and that he acted upon those specific misrepresentations, citing *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082 (*Mirkin*);¹³ that the evidence was insufficient to establish a duty to disclose the concealed information; and that any reliance by Boeken was unreasonable and therefore unjustifiable as a matter of law. But before we address these three specific arguments, we need to address the factual presentation by Philip Morris in its briefing to this court.

The jury found against Philip Morris on the fraud claims of intentional misrepresentation, concealment, false promise, and negligent misrepresentation. Philip Morris challenges only the evidence of its duty to disclose and of Boeken's reliance, not the evidence establishing that it made misrepresentations, made misleading statements and concealed the facts that would have clarified them, or that it made a false promise, all with an intent to defraud. Indeed, claiming such evidence is irrelevant to the argument regarding Boeken's reliance, Philip Morris does not summarize most of the large volume of evidence showing that it was aware of the health hazards and addictive nature of its tobacco products, or that it undertook a campaign to disseminate falsehoods about smok-

¹³ In *Mirkin*, the Supreme Court reaffirmed the California rule that a fraud cause of action requires proof of actual reliance, and rejected a fraud-on-the-market theory of reliance advocated by plaintiffs who could not plead or prove that they heard or read any of the alleged misrepresentations, whether directly or indirectly. (*Mirkin*, *supra*, 5 Cal.4th at pp. 1088-1092.)

ing and health, and to conceal the truth from the public, including Marlboro smokers such as Boeken, in order to mislead them into believing that their cigarettes were safe and not addictive.

“‘When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.’ [Citations.]” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The judgment is presumed to be correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) And we presume that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) It is the appellant’s burden to demonstrate that it does not. (*Ibid.*)

In furtherance of its burden, the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) Further, the burden to provide a fair summary of the evidence “grows with the complexity of the record. [Citation.]” (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.)

The record in this case is very complex. The testimony heard by the jury spans 25 of the 40 volumes of reporter’s transcripts. There are also 75 volumes of clerk’s transcripts in the record. Boeken has provided copies of approximately 40 exhibits admitted at trial, but it appears that there were hundreds more shown to the jury that have not been transmitted to this court. In addition, portions of Boeken’s videotaped deposition were played for the jury, and the parties have lodged a redacted transcript of the deposition, containing what appears to be 300 pages. Videotaped interviews of two other witnesses were lodged at our request, and were not transcribed.

Nevertheless, Philip Morris provided only the briefest summary of the trial evidence, and summarized only those facts which support its theories. Almost all of Philip Morris's factual summary consists of evidence favorable to its position—evidence showing that the dangers of smoking were well known by the public in the 1950s and 1960s; and other evidence from which a jury could reasonably infer that Boeken understood the health risks of smoking.

Even if Philip Morris were to show that the inferences it wishes us to draw are reasonable, we would have no power to reject the contrary inferences drawn by the jury, if they are reasonable as well. (*Crawford v. Southern Pacific Co.*, *supra*, 3 Cal.2d at p. 429.) And a recitation solely of Philip Morris's own evidence is not a fair summary for purposes of determining whether any inferences drawn by the jury are reasonable and supported by substantial evidence. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.)

The issue of reliance is inextricably intertwined with the nature of the misrepresentations or concealments attributed to Philip Morris. To expect us to address the issue of reliance without reference to all of the evidence presented at trial regarding the misrepresentations and concealments is, at best, naïve. At worst, it is an attempt to deceive.

In lieu of tendering all of the evidence, Philip Morris suggests that Boeken's counsel, Mr. Piuze, conceded the absence of evidence of reliance and causation during argument on post-trial motions when he answered, "No," to the following question by the court: "The question is, can the plaintiff point to a single statement made by Philip Morris that ultimately reached Mr. Boeken that can be traced backward through a definite causal link back to Philip Morris?" But the discussion of the matter did not end with that negative response. Piuze went on to explain to the court that the issue of reliance had been proven by *circumstantial* evidence, which

demonstrates the importance of a thorough presentation of all of the evidence.

"The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814.) Reliance "'may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of [reliance] than ... direct testimony to the same effect.' [Citations.]" (*Id.* at p. 814.)

We conclude that there was no concession by Mr. Piuze. While we could deem the failure of Philip Morris to set out the facts in the light most favorable to the judgment a forfeiture of the issue (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal. 3d at p. 881), we have elected not to do so and we have thoroughly reviewed the record. Our independent review has revealed sufficient evidence to support the judgment, as we discuss in the next sections.

A. Substantial Evidence Supports Duty and Actual Reliance

Philip Morris contends that the evidence was insufficient to establish a duty to disclose information that it fraudulently concealed. At the same time, however, Philip Morris concedes that a duty to speak may arise when necessary to clarify misleading "half-truths." (See *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1082-1083.) But, Philip Morris contends, no duty arises where the plaintiff has not been misled by the half-truths.

Philip Morris confuses the elements of duty and reliance. The duty arises upon the utterances of the half-truths; whether the plaintiff was misled is a question of reliance. (Cf., *Randi W. v. Muroc Joint Unified School Dist.*, *supra*, at p. 1084.) Since Philip Morris does not challenge the evidence

of its half-truths, we turn to its contentions with regard to reliance.

Relying on *Mirkin, supra*, 5 Cal.4th 1082, Philip Morris suggests that in order to show reliance, Boeken was required to prove that the false or misleading representations were made directly to him and that such proof must include the exact words of the false or misleading representation upon which he relied. We find no such requirements in *Mirkin*.

As stated in *Mirkin*, Restatement Second of Torts section 533 provides: "The maker of a fraudulent misrepresentation is subject to liability ... to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transactions involved." (*Mirkin, supra*, 5 Cal.4th at p. 1095.)

We first review the evidence particular to Boeken in connection with an argument that Boeken's fraud claim cannot stand because he could not recall a particular advertisement that made him decide to smoke.

Even before Boeken became a target member of the group of addicted smokers, Philip Morris targeted Boeken as a member of another group--adolescent boys. Until 1955, Marlboro was marketed primarily to women smokers. At that time, Philip Morris began to reposition the brand as masculine. From the mid-to-late 1950s, its ads featured a handsome, virile, tough and independent-looking young man with a tattoo, looking as though he could be a dashing movie star, a detective, a sailor, or a cowboy--the "Marlboro Man."

Marvin Goldberg, Ph.D., Boeken's marketing, advertising, and consumer behavior expert, explained how such advertising exerts a particularly powerful influence upon adolescent boys. He concluded from a review of Philip Mor-

ris's advertisements that they were intended to target young males from 10 to 18 years old, beginning in 1955. And, in Goldberg's opinion, the ads were aimed at young male "starters," first-time smokers.

Goldberg testified that child development literature suggests that young male adolescents are just developing their self-concept, and that they are very self-conscious. They feel that others are equally conscious of them, and want to appear to be mature, strong, independent, and masculine. If they see that a self-confident, virile, and handsome man is smoking a certain brand of cigarette, they are likely to conclude that if they smoke that brand, they will look less fragile and vulnerable than they really are. And when their peers do the same, the cigarette brand acts as a badge and a magnet.

Philip Morris advertised on popular family television shows in the 1950s and 1960s, such as "I Love Lucy," the most popular show in 1955. Other popular prime-time shows on which it advertised were "Red Skelton" and "Jackie Gleason," both comedy shows, "Rawhide," a western, "Perry Mason," a detective show, "Route 66," an adventure drama, "Alfred Hitchcock" and "East Side West Side," suspense and mystery shows. "Rawhide" and "Route 66" involved characters similar to the masculine images in the ads of that period.

Television advertising has been shown to be very effective, particularly with children. And more than 30 percent of the audience for such shows as "Red Skelton" and "Jackie Gleason" consisted of children, well above the percentage of children in the population.

Goldberg testified that Boeken's inability to recall being influenced by any particular advertisement does not mean that it was not a cause of his smoking. Goldberg described the various media for advertising, and explained that the average person receives about 1000 advertising messages per day, too many for most people to process; so most are perceived in glimpses, making repetition an important feature in

advertising. Thus, even if advertising images remain in the background, and are perceived only in glimpses, repetition causes them to become familiar, creating associations in the minds of people who do not think them through. This results in "associative learning," and those influenced by it are unlikely to be aware of it.

Associative learning is particularly effective with children. The Surgeon General's reports of 1994 and 1996 concluded that advertising encourages youth smoking. Studies have shown that the more children are exposed to cigarette advertising, the more they overestimate the number of smokers, and are persuaded that smoking is the norm. Such a belief among children is one of the highest risk factors for youthful smoking. They smoke because "it's the thing to do."

And, as the Supreme Court recognized in *Mirkin*, as well as prior to *Mirkin*, "[c]hildren in particular are unlikely to recall the specific advertisements which led them to desire a product...." [Citation.]” (*Mirkin*, *supra*, 5 Cal.4th at p. 1099, quoting *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 219.) Boeken's testimony bears this out. Boeken started smoking at the age of ten, occasionally sneaking butts from ashtrays. At the age of 12, he made play cigarettes from gum sticks, rolling them lengthwise. When he was 13 years old, he began to smoke whole, real cigarettes. He did it because "everybody smoked. All adults smoked. It was fashionable. It was sophisticated. It was cool. It was adult.... Sports figures smoked. Race car drivers smoked. Everybody smoked.... All the kids smoked." Boeken wanted to be grown up. He was at "that age," and that was "the thing to do."

He wanted to smoke even though it was not pleasurable at first--it caused him to feel dizzy, faint, and to cough, and he had to "train" himself to inhale. At first, he smoked whatever brand he could get his hands on, and then he discovered vending machines, which allowed him to pick the brand he

wanted. He used the vending machines in the coffee shops across from his junior high and high schools, where a pack of cigarettes cost only 25 cents and no one interfered.

With the discovery of vending machines, Boeken was able to buy a particular brand, and he chose Marlboros, because "[t]hey were everywhere. They advertised everywhere." It was the cigarette of choice in his social set, his culture, and all his friends smoked Marlboros. Marlboro ads seemed to be everywhere--at baseball games, sporting events, racing events, and on racing cars. Boeken testified, "I was visually inundated with this brand of cigarette." And he was "impressed by the ads," although he could not recall anything about any particular ads between 1957 and 1960. And no particular advertisement came to mind as a factor in his decision to smoke.

To Boeken, Marlboros represented a very macho, sophisticated, hip way of smoking. He perceived a message that it was the one and only cigarette to smoke. Boeken remembered the 1950s and 1960s as the age of Playboy Magazine, sophistication, machismo, and doing manly things, like smoking cigarettes.

In that era, Boeken thought of himself as a "real guy." At the time of his testimony, Boeken picked out several advertisements from the 1960s that looked familiar to him. He remembered the "Marlboro Country" ads, and the slogan, "Come to where the flavor is." Boeken also remembered billboards showing the "Marlboro man" with his lasso, and another with a healthy looking model in great shape jumping over a fence with one hand. Boeken thought that the healthy and robust images in the cowboy ads implied that Marlboros were good for you.

He thought the Marlboro man was a "man's man," like his hero, John Wayne. Boeken rode a motorcycle--his equivalent of John Wayne's horse, and in 1966, at the age 21, he rode around Europe on his motorcycle.

Over the years, another brand's ad campaign occasionally caught Boeken's attention, and he tried it for a few days, but always returned to Marlboros, although he was not sure exactly why. He knew he liked the taste better than other cigarettes--they were smoother, yet stronger.

Thus, Boeken started smoking Marlboros as a child for reasons that track Philip Morris's advertising of the time, and he remembered their themes with fair certainty, as well as how they enticed him to smoke with false images of health, sophistication, and machismo.

"Substantial evidence means such evidence as a reasonable fact trier might accept as adequate to support a conclusion; evidence which has ponderable legal significance, which is reasonable in nature, credible and of solid value. [Citations.]" (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 142.) We conclude that the foregoing evidence supports the jury's conclusion that Boeken relied upon advertising by Philip Morris.

We turn now to evidence of Boeken's reliance on the so-called "false controversy."

Boeken started smoking at the age of ten, occasionally sneaking butts from ashtrays. By the time he was 14 years old in 1957, Boeken was smoking two packs a day, and even more as he got older. By the time he was 15 or 16, Boeken had begun to suffer his first bouts of bronchitis. The doctor gave him antibiotics, but did not tell him to quit smoking. Although his high-school swim coach told him not to smoke, because it would affect his "wind," meaning endurance, no other teacher told him not to smoke. Most of the teachers smoked, as well. Boeken's mother allowed him to smoke openly at home. She smoked two packs a day herself, and never told him of the dangers of smoking.

Boeken suffered more bouts of bronchitis in his twenties, and by his thirties, he suffered two or three each winter. They

were always treated with antibiotics, and no doctor ever told Boeken that they were caused by smoking. Many doctors also smoked at that time. Boeken began to suspect in the mid-seventies that smoking bore some relationship to his bronchitis, but he was unable to stop or even cut down on the number of cigarettes he smoked while he was ill, even when it hurt to inhale.

The Surgeon General warnings went on cigarette packs in the mid-to-late 1960s. Boeken thought that the warnings were "political more than anything else," and that they were required by the government pursuant to some personal vendetta of the Surgeon General. He did not even read the Surgeon General's warning until after he filed this action. Boeken explained, "I believed the cigarette advertisements.... I didn't think there was anything wrong.... I believed they were good for you. I believed everybody smoked them. You're back in the 60's, right?.... I didn't believe they were unhealthy."

But Boeken was aware of what he described as a "controversy." He testified that in the 1960s, he heard that the cigarette companies had refuted the fact that cigarettes were addictive, dangerous, harmful, or cancer-causing, and he was aware of a "conflict" over the Surgeon General's warnings. And he relied upon the refutations by the tobacco industry. It was only much later that Boeken discovered there was no *real* controversy. He testified that if Philip Morris had made the real risk of lung cancer and death clear to him in the 1960s, when Philip Morris was instead creating a false controversy with regard to the Surgeon General's report, he would have quit smoking.

In the 1970s, Boeken heard through various news media that tobacco companies claimed that there was no proof or scientific fact that smoking caused cancer, emphysema, or any other lung or blood disease. He trusted them, and believed the harm was being overstated by others. Other than

advertisements, however, he could not recall particular statements made by tobacco companies until much later, when tobacco executives falsely testified before Congress in 1994.

By the 1970s, he knew that cigarettes were addictive, and that he was addicted, but he believed the statements by the industry that there was no health risk. The first time that Boeken knew that smoking could cause a catastrophic illness was around 1976, when he had his gallbladder removed, and the doctor told him he could get emphysema. He consulted another doctor, who said, "Forget it. You don't have emphysema. He was playing with you."

Boeken tried to stop smoking several times over the years. The first time was in 1967, when his girlfriend gave him an ultimatum. He did not want to lose her, so he stopped; but three or four weeks later, he started again, and she left him.

Boeken tried to quit again in 1976, at the beginning of what he termed, "the health craze," when jogging became popular. He wanted to jog too, and he started lifting weights, but he felt he needed stronger "wind." He was unable to stop smoking, however, due to withdrawal and cravings. His withdrawal symptoms consisted of a bad attitude, nastiness, anger, and a huge appetite. He became edgy and snappy, with inappropriate angry reactions.

In 1980, Boeken tried hypnosis to quit. He succeeded for 30 or 40 days, the longest time ever, but he was a "nervous wreck." His first relapse, a cigarette smoked with a cup of coffee, felt like "the best thing that ever happened" to him. In 1982, Boeken attended a Smoke Enders course for three or four weeks, attending three or four times a week. And in 1986 or 1987, he joined Smokers Anonymous, a 12-step program. He was motivated to quit by more frequent bouts of bronchitis, as well as a continuing desire to run, but he claimed that he still did not know that smoking caused lung

cancer. Boeken tried Nicorette gum on more than one occasion, and patches, sometimes both at the same time, but he failed to quit.

After a three-month heroin addiction in the late 1960s, Boeken entered a methadone maintenance program, and quit methadone within three years. In the mid-seventies, Boeken went to Alcoholics Anonymous and stopped drinking in nine months. But he has never been successful at quitting smoking.

In 1981 or 1982, thinking it would lessen his bronchitis, Boeken switched to Marlboro "Lights," because they were lower in tar and nicotine, and "milder." As soon as Philip Morris began to market Marlboro "Ultralights," he switched to those.

On the news in 1994, Boeken saw portions of the testimony of tobacco company executives before Congress. They all denied that tobacco was addictive or harmful. They all denied under oath that it caused cancer. He knew they were lying, but at the time, he still believed them, because he did not think they would lie to the government under oath. Also in 1994, Boeken's mother, who smoked two packs a day until her death, died of lung cancer, and he had no more doubts about whether smoking caused cancer. It was much later that he learned for the first time that accelerants, additives, or chemicals were added to the tobacco in his cigarettes, in order to increase their addictiveness.

Even then, Boeken was still unable to quit. In October 1999, he was diagnosed with lung cancer and underwent extremely painful surgery to remove the upper part of a lung, and then he began chemotherapy. By that time, however, the cancer had spread to his lymph nodes, and his chance of surviving the disease was less than one percent. Within a year, the cancer had spread to his brain, and there was no chance of survival.

Boeken stopped smoking just before the surgery to remove part of his lung, but started taking an occasional puff or two after the first round of chemotherapy was over, because it calmed him. But he was shattered when he was diagnosed with brain cancer, and felt he needed more, so he bought a pack of Marlboro Reds, and was soon smoking two or three packs a day.

Boeken testified that if Philip Morris had made it clear to him in the 1960s, the 1970s, or even the 1980s, that cigarettes cause lung cancer and death, he would not have smoked. At least, he thought he would have made an "honest effort" to quit. He also felt that if Philip Morris had admitted in the 1960s or 1970s, not only that smoking caused lung cancer, but also that Philip Morris added ingredients to Marlboro cigarettes in order to increase their addictiveness, he would have stopped smoking Marlboros.

The record supports the conclusion of the jury that Boeken, an addicted smoker, was a target of Philip Morris's misrepresentations and that he actually relied upon its campaign of doubt.

B. Substantial Evidence Supports a Finding of Justifiable Reliance

Philip Morris contends that Boeken's reliance upon its fraud was unreasonable and therefore, it suggests, unjustifiable as a matter of law. In support of this contention, Philip Morris relies in part upon Ohio law, as interpreted by a federal trial court in an unpublished memorandum opinion, *Glassner v. R.J. Reynolds Tobacco Co.* (N.D. Ohio Jun. 29, 1999) 1999 WL 33591006. Philip Morris claims that the federal court of appeals, in *Glassner v. R.J. Reynolds Tobacco Co.* (6th Cir. 2000) 223 F.3d 343, affirmed the trial court's ruling that as a matter of law, evidence of common knowledge of the dangers of smoking requires a finding that reli-

ance on the tobacco companies' fraud is unjustifiable. Philip Morris misreads the appellate opinion. While the appellate court affirmed the judgment, it expressly disagreed with the district court's ruling on justifiable reliance. (See *id.* at p. 353.)

Philip Morris also relies upon Massachusetts law, as interpreted by a federal trial court. (E.g., *Massachusetts Lab. Health & Wel. v. Philip Morris* (D.Mass. 1999) 62 F.Supp.2d 236, 244.) That court held that the facts alleged in the complaint filed by a union trust fund did not amount to justifiable reliance as a matter of law, but applied the same objective standard of reasonableness to both intentional misrepresentations and negligent misrepresentations. (See *id.* at p. 244.)

Under California law, which controls in this case, whether reliance was reasonable is a question of *fact* for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) Further, under California law, whether reliance is reasonable in an *intentional* fraud case is not tested against the "standard of precaution or of minimum knowledge of a hypothetical, reasonable man." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415.)

"Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. [Citations.] 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' [Citation.] If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. [Citations.] 'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he

must have closed his eyes to avoid discovery of the truth....' [Citation.]" (*Seeger v. Odell, supra*, 18 Cal.2d at p. 415.)

As we have discussed, it is presumed that the evidence is sufficient to support the jury's factual findings, and it is the appellant's burden to demonstrate that it does not. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) And in furtherance of that burden, the appellant must fairly summarize the facts in the light favorable to the judgment. (*Ibid.*) We have previously noted that Philip Morris failed to do so, which results in a forfeiture of the contention. (See *ibid.*)

Notwithstanding the forfeiture, substantial evidence supports a finding that Boeken's reliance was justifiable. The evidence supports the conclusion that Philip Morris knew in the late 1950s, when Richard Boeken started smoking, that cigarettes caused lung cancer. Further, it is reasonable to infer that it also knew by that time, or at least well before 1969, that nicotine was addictive, and that the more nicotine its cigarettes could deliver, the more quickly a smoker would become addicted. Understanding the danger of this information, Philip Morris set up its campaign of deception. Boeken testified that his belief in the tobacco companies, rather than the Surgeon General, was wishful thinking or naiveté. But he had believed in the honesty of "big business." Further, Philip Morris had studied and understood nicotine addiction, and from the facts we have previously summarized, it is reasonable to infer that the jury concluded it knew and intended that addicted smokers would reasonably use its misrepresentations and misleading statements to engage in denial and rationalization; and moreover, that smokers' ignorance of the increased addictiveness of Philip Morris's Marlboro brand would keep them smoking Marlboros and ensure their reliance upon such denial and rationalization.

2. Product Liability

Philip Morris contends that Boeken failed to prove the elements of product liability, because “[a] defendant ... may not be held liable for selling a legal product merely because that product is inherently dangerous,” without “showing either (1) that the product was improperly designed or manufactured; or (2) that the product lacked appropriate warnings.” The problem with this argument is that it does not address all theories of product liability presented to the jury. Thus, even were we to agree with Philip Morris in this argument, the verdict may be affirmed on the basis of the consumer expectations test.¹⁴

Although denominated, “special verdict,” the verdict was a general one, since it contained no findings of fact. (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347, fn. 7; Code Civ. Proc., §§ 624, 625.) “[W]here several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error. [Citations.] When a situation of this character is presented it is a matter of no importance that the evidence may have been insufficient to sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues.” [Citation.]” (*Mouchette v. Board of Education* (1990) 217 Cal.App.3d 303, 315, disapproved on another ground in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 984, fn. 6; See also, *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673.)

Substantial evidence supports a finding that Marlboro Lights were a defective product under the consumer expectations test. The consumer expectations test is satisfied when

¹⁴ Additionally, in light of the fact we have found substantial evidence supports the fraud count, that is sufficient to support the verdict.

the evidence shows that "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429.) Some degree of misuse and abuse of the product is foreseeable. (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833.)

Dr. Benowitz testified that Marlboro "Lights" and "Ultralights" are not light at all, since they deliver more than 0.1 milligram nicotine and more than 1 milligram tar per cigarette to human smokers who compensate. Compensation occurs when the smoker adjusts the way he or she smokes in order to get a satisfying amount of nicotine, by covering the holes in the filter, sucking harder, drawing the smoke further into the lungs, and keeping it in longer. Benowitz testified that studies have shown that most smokers believe that light cigarettes are safer than regular cigarettes, and the majority of smokers do not know that they compensate. Compensation by smokers draws carcinogens further into the lungs, which is more likely to cause adenocarcinoma of the lung, a more aggressive form of cancer than those more prevalent among smokers of regular strength cigarettes.

Philip Morris suggests that the consumer expectations test is, in essence, one for failure to warn, and therefore preempted by the Public Health Cigarette Smoking Act of 1969.¹⁵ Again, we disagree. Product liability under a failure-to-warn theory is a distinct cause of action from one under the consumer expectation test. (*Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 717.)¹⁶

We turn to Philip Morris's claims of instructional error.

¹⁵ See a more detailed discussion of the 1969 Act, within.

¹⁶ Since smokers do not know they compensate, a warning may not make the product any safer. Philip Morris's own expert, Dr. Richard Carchmann, admitted that the only way to reduce the risk is to quit smoking.

3. Civil Code section 1714.45

Philip Morris contends that Boeken was not entitled to a finding of product liability, whether measured under the "risk-benefit" test or the "consumer expectations" test, and that the trial court erred in instructing with BAJI No. 9.00.5 instead of 9.00.6.¹⁷

BAJI No. 9.00.6 is derived from the former version of Civil Code section 1714.45, which provided cigarette manufacturers with immunity from product liability actions.¹⁸ (Stats. 1987, ch. 1498, § 3, p. 5778; see *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 837(Myers).) "The statute was originally passed in 1987 and, as pertinent, provided: 'In a product liability action, a manufacturer or seller shall not be liable if: (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, *tobacco*, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts.'" (Italics added.)

Thus, as originally enacted in 1987, the statute's enumerated examples of common consumer products included to-

¹⁷ BAJI No. 9.00.6 reads: "The (manufacturer or seller) of a product is not liable for [injuries] [death] caused by a defect in its design, which existed when the product left the possession of the (manufacturer or seller), if: [¶] 1. The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer, who has the ordinary knowledge common to the community, and who consumes the product; and [¶] 2. The product is a common consumer product intended for personal consumption."

¹⁸ We shall hereinafter refer to the statute as section 1714.45 or "the immunity statute."

bacco. (See Stats. 1987, ch. 1498, § 3, p. 5778; *Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 860-862 (*Naegele*)). It was based upon the position taken in Comment i of Section 402A of the Restatement Second of Torts, that “a manufacturer or seller *breaches no legal duty* to voluntary consumers by merely supplying, in an unadulterated form, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers.’ [Citation.]” (*Naegele, supra*, 28 Cal.4th at p. 864, italics in the original, underscoring added.)

In 1997, the Legislature amended section 1714.45 to rescind the statutory immunity for tobacco companies as of January 1, 1998. (Stats. 1997, ch. 570, § 1; see *Myers, supra*, 28 Cal.4th at pp. 832-833, 837.) Thus, “while the Immunity Statute was in effect--from January 1, 1988, through December 31, 1997--no tortious liability attached to a tobacco company’s production and distribution of pure *and unadulterated* tobacco products to smokers. [Citations.]” (*Myers, supra*, at p. 840, italics added.)

The statute was expressly retroactive, and while it was in effect, it immunized tobacco manufacturers from liability for conduct before, as well as during the ten-year period. (*Myers, supra*, 28 Cal.4th at p. 847; *Souders v. Philip Morris Inc.* (2002) 104 Cal.App.4th 15, 24, fn. 7.) Once it was repealed, however, the statute’s retroactive effect was nullified, and tobacco companies were no longer immune to liability for conduct occurring prior to 1988.¹⁹ (*Myers, supra*, 28 Cal.4th at p. 847.)

¹⁹ In *Myers*, the Ninth Circuit Court of Appeals had certified the following question to the California Supreme Court: “‘Do the amendments to Cal. Civ. Code § 1714.45 that became effective on January 1, 1998, apply to a claim that accrued after January 1, 1998, but which is based on conduct that occurred prior to January 1, 1998?’” (*Myers, supra*, 28 Cal.4th at p. 839.)

Neither *Myers* nor *Naegele* had been decided when Philip Morris filed its opening brief. In its opening brief, Philip Morris argued that repeal of the original section 1714.45 did not nullify its retroactivity, and that it retained immunity from liability that would otherwise have arisen not only prior to 1998, but also prior to the statute's passage in 1987. Before Philip Morris filed its reply brief, *Naegele* and *Myers* were published. *Myers* held that the immunity statute applied to tobacco only during the ten years beginning January 1, 1988 and ending December 31, 1997. (*Myers*, *supra*, 28 Cal.4th at p. 837.) *Naegele* confirmed this and also held that the protection of the ten-year immunity statute did not "extend to allegations that tobacco companies, in the manufacture of cigarettes, used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking." (*Naegele*, *supra*, 28 Cal.4th at p. 861.) Therefore, except for the limited ten-year period, Philip Morris was not entitled to have the jury instructed with BAJI No. 9.00.6. (See Comment to BAJI No. 9.00.6 (Jan. ed. 2004); Stats. 1997, ch. 570 (S.B. 67), § 1.)

Although Philip Morris addressed *Naegele* and *Myers* in its reply brief, we permitted it to file a supplemental opening brief. For the first time in its supplemental brief, Philip Morris claims that it requested and submitted a jury instruction that would have limited its liability for any wrongs committed during the ten-year immunity period, proposed special instruction lettered "O."

Philip Morris's packet of *proposed* jury instructions, filed on May 16, 2001, included that proposed instruction, which reads: "You may not find defendant liable on plaintiff's claims of design defect, negligence, fraud and conspiracy or failure to warn based on anything that defendant did or did not do between January 1, 1988, and December 31, 1997. It was the policy of California during that period to recognize cigarettes as inherently unsafe products that could nevertheless be lawfully sold because they carried adequate warnings

regarding their dangers, and to encourage the continued availability of cigarettes and other tobacco products to those adult consumers who wished to use them. This was accomplished by a law that protected producers or suppliers of cigarettes or other tobacco products from legal responsibility for harms suffered by those who voluntarily consumed such products. That law was repealed as of January 1, 1998, and has no legal effect with respect to conduct since that date, and also has no legal effect with respect to plaintiff's claim for breach of express warranty."

The problem we have is that we have found no ruling by the trial court rejecting this instruction. The instruction conference was unreported. We did find a cover sheet signed by the trial judge, and file-stamped June 6, 2001, which is entitled, "Instructions--Refused Withdrawn, Consisting of 10 pages herein." But the ten pages are not attached, unless the cover sheet was meant to refer to the ten pages attached to the document immediately following it in the Clerk's Transcript.

The document immediately following the trial court's cover sheet is entitled, "Objections of Defendant Philip Morris Incorporated to Court's Rejection of Certain Jury Instructions Proposed by Defendant." The ten pages that follow contain seven proposed instructions. Proposed Instruction O is not among them.

We requested Philip Morris to provide us with the exact page numbers in the appellate record where the trial court's refusal to give its proposed Instruction O might be found, or to augment the record with a copy of the trial court's minute order or additional reporter's transcript, if any, showing the refusal, or to inform this court if there was no such order or ruling. Rather than directly respond to our request, Philip Morris filed a letter brief suggesting that we must assume that the instruction was requested and rejected, *because the record is silent* with regard to an express ruling, and the in-

struction conference was in chambers. As authority for its suggestion, Philip Morris states that it knows of no authority to the contrary. In fact, there is no shortage of authority to the contrary. It is well established that error cannot be presumed, and it is the appellant's burden to provide a record sufficient to show the asserted error. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.)

Relying upon language in *Alexander v. Nextel Communications, Inc.* (1997) 52 Cal.App.4th 1376, Philip Morris contends that we must assume that it requested and the court rejected the instruction, even absent a record of the ruling. In that case, we were satisfied that certain instructions were, in fact, requested but refused, although there was no discussion between court and counsel in the record. (See *id.* at p. 1379, fn. 3.) But we did not enunciate a rule that whenever the instruction conference is unrecorded, it must be assumed that a particular instruction has been requested and refused.

Here, the evidence is that the instruction was in the *proposed* packet filed on May 16, 2001. But we cannot conclude Philip Morris actually requested that the court instruct the jury with it. Rather, the inference from the record is that for tactical reasons the instruction was either withdrawn or not proffered to the court by Philip Morris. This inference is consistent with the fact that instruction O was not attached to the "Objections of Defendant Philip Morris Incorporated to Court's Rejection of Certain Jury Instructions Proposed by Defendant." It is also consistent with the legal position asserted by Philip Morris at trial, and in its opening brief on appeal: that the statute immunized it from liability for all conduct prior to January 1, 1998, including all conduct preceding January 1, 1988, not just for the ten year period the statute was in force. A party is not entitled to instructions with regard to a theory or defense that the party has *not advanced*. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

Philip Morris also filed a motion to augment the record, but not with an agreed or settled statement reflecting the in camera instruction conference or any ruling on the instructions. (See *Maria P. v. Riles*, *supra*, 43 Cal.3d at p. 1295; *In re Kathy P.* (1979) 25 Cal.3d 91, 102; Cal. Rules of Court, rules 6, 7, 12(a).) Instead, Philip Morris seeks to augment the record with the trial court's statement of decision regarding Philip Morris's pretrial motion for summary adjudication, in an attempt to show that requesting an instruction or a ruling on the proposed instruction would have been futile, because the trial court had already ruled against it on that issue. We grant the motion, because the statement of decision was part of the trial court record. But we find the statement of decision consistent with our inference. It discloses the claim by Philip Morris of immunity for all pre-1998 conduct, not just conduct between 1988 to 1998.

We also note that instruction O was incomplete because it did not incorporate the term "unadulterated" within its language. Philip Morris argues that the omission was so minor as to require the trial court to modify the instruction. We disagree. "A trial court has no duty to modify or edit an instruction offered by either side in a civil case. If the instruction is incomplete or erroneous the trial judge may ... properly refuse it. [Citations.]" (*Truman v. Thomas* (1980) 27 Cal.3d 285, 301.)

Philip Morris states in its reply brief that "there is no evidence that Philip Morris, during the 1960s or at any other time, was adding things to Marlboro cigarettes ... for the purpose of addicting plaintiff or any other smoker." In fact, there is more than ample evidence in the record, as previously discussed, that Philip Morris incorporated additives that not only increased the risk of harm from nicotine, but also created harmful effects not inherent in smoking unadulterated tobacco.

The evidence also established, contrary to Philip Morris's assertions, that additives contributed to Boeken's lung cancer. By the age of 14, Boeken smoked every day, at least two packs a day, and continued for 40 years, unable to quit for more than a brief period even after he was diagnosed with lung cancer. According to Benowitz, Boeken was not just addicted to cigarettes, he was highly addicted. The increased ammonia had done its job of addicting more effectively and more quickly.

Further, Farone testified that 20 percent of the contents of a cigarette consists of added flavorings. Flavorings such as chocolate and licorice are not added simply to improve the taste, but also to make it easier to inhale the smoke by creating bronchodilators, which open up the lungs. Cigarettes that are easier to smoke allow carcinogens to reach deeper into the lungs, which can lead to adenocarcinoma, the very aggressive and fast-spreading cancer from which Boeken suffered.

Epidemiologist and oncologist, Gary Strauss, explained that when cigarettes are more irritating, people do not inhale deeply, and the central part of the lungs is the area primarily exposed to cancer-causing particulates. The more deadly adenocarcinomas, however, grow in the periphery, that is, the end of the lung, reached by deeper inhaling. The incidence of these cancers has increased in recent years and that increase is attributable to low-tar cigarettes.

We conclude that even if Philip Morris did not withdraw Proposed Instruction O, and the court did refuse to give the instruction, the court did not err.

4. Federal Preemption Contentions

Philip Morris contends that certain evidence, argument, and claims were preempted by the Public Health Cigarette Smoking Act of 1969, and that the trial court failed to in-

struct the jury properly "on this point." Its contentions are twofold: (1) the trial court erred by refusing to "instruct the jury, as Philip Morris requested, that it could not hold Philip Morris liable on the ground that its post-1969 advertising contained supposedly 'glamorous' and 'healthy' imagery"; and (2) that the trial court erroneously "admitted, over Philip Morris's objection, evidence that Philip Morris's advertising contained such imagery."

The 1969 Act requires a particular warning, or a variation of it, to appear in a conspicuous place on every package of cigarettes sold in the United States. (15 U.S.C. § 1333; see generally, *Cipollone, supra*, 505 U.S. at pp. 515-518, 525.) It also explicitly reserves authority to The Federal Trade Commission to identify and punish deceptive advertising practices relating to smoking and health. (*Cipollone, supra*, at p. 529; 15 U.S.C. § 1336.) The United States Supreme Court has construed the 1969 Act as preempting damage claims based upon a failure-to-warn theory that requires a showing that post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, or that its advertising tended to minimize or neutralize the health hazards associated with smoking. (*Cipollone, supra*, 505 U.S. at pp. 524, 527-528.)

We first address the second contention of Philip Morris: that the trial court erred in permitting Dr. Goldberg to testify at length and over its objection about preempted, post-1969 advertising. In that testimony, which took place on April 17, 2001, Goldberg referred to several exhibits which have not been made a part of the record on appeal. He described them as advertisements that demonstrate an intent to market Marlboro cigarettes to adolescent males, and to turn youthful non-smokers into smokers.

Philip Morris fails to identify a specific objection it made in connection with this testimony. A judgment may not be reversed unless the record shows that the appellant made a

timely objection to or a motion to exclude or to strike the evidence and that the specific ground of the objection or motion was stated. (Evid. Code, § 353, subd. (a).)

Philip Morris contends that its objection was made in its motion in limine No. 1, which stated a general objection to any and all evidence that *might* relate to preempted advertising. Philip Morris's motion in limine did not, however, specify any particular evidence to be excluded, and did not mention the Goldberg testimony about which it now complains.

A motion in limine to exclude evidence is not a sufficient objection unless it was directed to a particular, identifiable body of evidence and was made at a time when the trial court could determine the evidentiary question in its appropriate context. (*People v. Morris* (1991) 53 Cal.3d 152, 188-190, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Thus, Philip Morris's motion in limine did not preserve the issue for appeal.

Philip Morris also contends that the court gave it a "running objection ... to this whole area." The court allowed Philip Morris a "running objection" in a discussion which took place the day before the Goldberg testimony now in question, and although it does appear that the court may have been referring to evidence of preempted advertising, the discussion on that day was precipitated by Philip Morris's objection *on the ground of relevance* to testimony concerning the targeting of youthful smokers after Boeken became an adult. Philip Morris's counsel, Mr. Leiter, made it clear to the court that *he was not objecting to post-1969 youth-targeted advertising on the ground of federal preemption*.

On the day at issue, April 17, 2001, after Goldberg read an excerpt from an article about youth smoking, Leiter said, "Your Honor, may we have our standing objection," but he did not explain what standing objection he had in mind. The judge assented, apparently thinking that he understood to

which objection counsel was referring, and he then took the matter up outside the jury's presence. The ensuing discussion began in relation to targeting youth smokers, and the court referred to a discussion of the subject the day before, April 16, 2001.

In the April 17 discussion, it was again the court that brought up the issue of preemption. Counsel for Boeken offered to stipulate to having the court strike the article from which Goldberg had read. Leiter responded that he would prefer a limiting instruction, either at that time or later in the trial, regarding the proper use of the testimony and warning against the improper use of it under *Cipollone*. The court agreed to give such an instruction once it had "an appropriately written jury instruction" before it. Leiter agreed, with the understanding that he continue to have "a standing objection to all such testimony." The court replied, "You do, you do," and ruled that the "current information with the exception of erosion type suggestions" was relevant to an understanding of what occurred in the 1950s, when Boeken started smoking.

Thus, it appears that Philip Morris did not object to the Goldberg testimony regarding post-1969 advertisements, and whatever its vague "running" or "standing" objection was, it was not "directed to a particular, identifiable body of evidence," and therefore did not comply with Evidence Code section 353, subdivision (a). (*People v. Morris, supra*, 53 Cal.3d at pp. 188-190.) The testimony to which Philip Morris did object concerned an excerpt from an article regarding the targeting of youth smokers, and Philip Morris refused an offer to stipulate to the court's striking that testimony, agreeing instead upon a limiting instruction to be submitted in writing. Even if Philip Morris could bootstrap its objection to the reading of the article into an objection to the testimony that preceded it, it may not complain on appeal about the admission of evidence that it induced the court not to strike. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) We con-

clude that Philip Morris has not preserved the issue for appeal.²⁰

We turn to Philip Morris's claim that it requested two instructions relating to federally preempted advertising, and that the trial court refused both requests. The first of the two instructions at issue was requested *orally* during the testimony of Boeken's expert on nicotine addiction, Benowitz. Philip Morris has summarized neither the testimony nor its discussion with the court, has not put its request for this instruction in context, and has not summarized the court's ruling, which was not simply a refusal to give a requested instruction, as we shall explain. We begin with a summary of the relevant portions of the record.

Philip Morris objected during Benowitz's testimony regarding the use of healthy, sexy, happy models in advertisements, and moved for a mistrial. The court disagreed with that characterization of the testimony, and denied the mistrial, but offered to instruct the jury to disregard whatever it had heard from this particular witness with regard to advertisements. Philip Morris's counsel, Mr. Leiter, replied, "We would ask that the court affirmatively instruct the jury that it may not find liability in this case based on any accusation or any evidence that healthy images in ads undercut the health warnings mandated by the Congress."

²⁰ On rehearing, Philip Morris contends that we erroneously interpreted the running objection as relating to youth marketing, rather than evidence of preempted neutralization claims. Philip Morris still does not identify a *particular, identifiable body of evidence*, whether it is evidence of preempted neutralization, youth marketing, or some other theory. An objection to "this whole area," even if clearly based upon *Cipollone*, *supra*, 505 U.S. at pp. 524, 527-528, does not preserve the issue for appeal. (Cf., *People v. Morris*, *supra*, 53 Cal.3d at pp. 188-190.)

The court refused to give this specifically requested language. But contrary to Philip Morris's suggestion that no instruction was given on the issue, the court did instruct as follows: "Ladies and gentlemen, just before we took the break, there was some testimony from this witness regarding certain advertising images and their potential effects. You'll recall that testimony. [¶] I instruct you at this time that with respect to that testimony, I want you to *disregard it for all purposes and do not use it for any purpose whatsoever* in this trial." (Italics added.) Since Philip Morris has referred to nothing to the contrary, we presume the jury followed the court's instruction. (See *People v. Harris* (1994) 9 Cal.4th 407, 426.)

The second instruction that Philip Morris claims the court erroneously refused was its proposed instruction J.²¹

²¹ The proposed instruction reads as follows: "Regardless of any of the other rules of law set forth in these instructions, you must follow the rules of federal law which I shall now give you. [¶] Because of federal law, you cannot hold defendant liable on the basis that after July 1, 1969, it should have included additional or more clearly-stated warnings in the advertising or promotion of [its] cigarettes because, as a matter of federal law, after July 1, 1969, defendant adequately warned plaintiff of the health risks of smoking, including 'addiction.' [¶] Also because of federal law, and except only as stated below, you cannot hold defendant liable on the basis that it: [¶] (a) through its advertising or promotional practices, neutralized, minimized, or undermined the effect of the federally mandated warnings appearing on every cigarette package after July 1, 1969, or [¶] (b) after July 1, 1969, failed to disclose, or concealed, or suppressed information about the health risks of smoking including 'addiction.' [¶] The federal law does not limit the potential liability of defendant against claims that its product was defective in design in other respects, or that the defendant was negligent in other respects in the design of their product. The federal law also does not limit the potential liability of defendant

As with Proposed Instruction No. O, we find no ruling by the trial court rejecting this instruction. Our request for a citation to the record for the trial court's purported refusal of Instruction No. O also included a request for a citation to the court's purported refusal of Philip Morris's proposed Instruction No. J. Philip Morris has provided no such citation, and has not attempted to augment the record with an agreed or settled statement. (See *Maria P. v. Riles*, *supra*, 43 Cal.3d at p. 1295; *In re Kathy P.*, *supra*, 25 Cal.3d at p. 102; Cal. Rules of Court, rules 6, 7, 12(a).) But we did find Proposed Instruction J in the group of instructions under cover of the "Objections of Defendant Philip Morris Incorporated to Court's Rejection of Certain Jury Instructions Proposed by Defendant."

If the trial court did, in fact, refuse Instruction No. J, Philip Morris has failed to demonstrate error. A trial court is not required to give instructions in the precise language proposed, and it is not error to refuse instructions that are not reasonably brief, concise, and understandable to the average juror. (*Dodge v. San Diego Electric Ry. Co.* (1949) 92 Cal.App.2d 759, 763-764.)

"Proposed instructions which are argumentative and misleading should not be given. [Citation.] Instructions should not draw the jury's attention to particular facts. It is error to give and proper to refuse an instruction that unduly overemphasizes issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.] ... Repetitious reference, in the instructions, that under the circumstances related the jury 'must find in favor ... of defendant' has been condemned. [Citation.]" (*Dodge v. San Diego Electric Ry. Co.*, *supra*, 92 Cal.App.2d at p. 764.) In-

against claims that it made affirmative misrepresentations about the health risks of smoking."

struction J suffered from all these infirmities, and the trial court had no duty to give it.

In any event, "[n]o judgment shall be set aside ... on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, ... unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) The burden is on Philip Morris, as appellant, to show that error has resulted in a miscarriage of justice. (*Cucinella v. Weston Biscuit Co.*, *supra*, 42 Cal.2d at p. 83.) Philip Morris has failed to so demonstrate.

In fact, the trial court instructed the jury regarding the 1969 limitations throughout its charge to the jury.

With regard to fraudulent concealment, the court instructed, "[F]ailure to disclose ... is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose ... prior to July 1, 1969." The special verdict form asked, "Prior to July 1, 1969, did defendant conceal or suppress a material fact?"

With regard to the product liability claim, the court instructed, "A product may be defective because of a defect in design or a failure to adequately warn the consumer prior to July 1, 1969"; and, "[A] product is defective if the manufacturer ... has a duty to warn of dangers and fails to provide an adequate warning of those dangers prior to July 1, 1969, a date established by law in this case"; and, "A cigarette manufacturer has a duty to warn prior to July 1, 1969 if [etc.];" and, "For the period prior to July 1, 1969, one who supplied a product ... has a duty to use reasonable care to give warning."

Further, the special verdict form asked, "Was there either (1) a defect in design, or (2) a defect resulting from a failure to warn occurring before July 1, 1969?"

Thus, the jury was not permitted, as Philip Morris contends, to base liability upon a failure to warn after July 1, 1969, or upon advertising that minimized or neutralized the federally mandated warning after that date.

Philip Morris complains that opposing counsel was permitted to argue that Philip Morris was the "'devil' because of its allegedly glamorous advertising practices"; that Philip Morris "'spent hundreds of millions and billions of dollars putting out advertising images to the exact contrary' of the dangers of smoking"; that "'Marlboro is on the side of Ferraris in Formula One Racing [and] guys, especially, who see themselves, adventurous or resourceful or strong go for that.' Mr. Boeken did. He saw himself as that man."

If opposing counsel's argument tended to minimize or neutralize federally mandated warnings, it was incumbent upon Philip Morris to object and request that the jury be admonished. (See *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318.) Since it did not do so, it waived any contention based upon improper argument. (*Id.* at p. 318; *Horn v. Atchison T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610.)²²

We conclude that Philip Morris has failed to meet its burden to show that the trial court erred by refusing its instructions, as well as its burden to show that any such refusal amounted to a miscarriage of justice.

5. Youth-Targeting

Citing *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057 (*Mangini*) and *Lorillard Tobacco Co. v. Reilly*

²² For the first time on rehearing, Philip Morris contends that the purpose of its proposed instruction No. J was to be an admonishment. Since there is no language in the instruction directed at opposing counsel's argument, this argument appears to be merely an afterthought.

(2001) 533 U.S. 525 (*Reilly*), Philip Morris contends that the trial court erred in permitting counsel for Boeken to argue repeatedly to the jury that Philip Morris targeted youth in its advertising, and in failing to instruct the jury that it could not consider evidence of such advertising.

The jury began its deliberations on May 22, 2001, and returned its verdict on June 6, 2001. On those dates, the California Supreme Court's opinion in *Mangini* had not yet been called into doubt by the United States Supreme Court's opinion in *Reilly*, which was published on June 28, 2001.

Mangini held that an unfair competition action seeking to enjoin youth-targeted advertising was not preempted by the 1969 Act, because such advertising was "not 'based on smoking and health'; [but] 'the more general duty not to' unfairly assist or advertise illegal conduct [selling cigarettes to minors]. [Citation.]" (*Mangini, supra*, 7 Cal.4th at p. 1069, quoting *Cipollone, supra*, 505 U.S. at p. 529.)

Reilly concerned a Massachusetts law that prohibited outdoor advertising and regulated point-of-sale advertising of cigarettes and other tobacco products "within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." (*Reilly, supra*, 533 U.S. at p. 535.) The United States Supreme court did not perceive a "distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns." (*Reilly*, 533 U.S. at pp. 550-551.)

The Court also found no "distinction between state regulation of the location as opposed to the content of cigarette advertising ... in the text of the pre-emption provision. Congress pre-empted state cigarette advertising regulations ... because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette

advertising in electronic media in order to address concerns about smoking and health. Accordingly, [the Court held] that the [Massachusetts] outdoor and point-of-sale advertising regulations targeting cigarettes are pre-empted by the FCLAA [the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.]" (*Reilly*, 533 U.S. at p. 551.)

Although no claim in this case was based upon post-1969 advertising, Philip Morris contends that the improper argument of counsel permitted the jury to assess punitive damages based upon evidence of post-1969 youth-targeted advertising. It argues that any objection would have been futile because the reasoning of *Mangini* would have permitted such evidence and argument and it was not until after trial was concluded that *Reilly* effectively overruled *Mangini*.

To the extent that Philip Morris's contention is, in effect, an evidentiary challenge, such "challenges are usually waived unless timely raised in the trial court, [unless] the pertinent law later changed so *unforeseeably* that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703, italics added.)

And where a party fails to request a limiting instruction with regard to the admissibility of evidence that the law did not deem inadmissible until after trial, the issue may be raised on appeal if neither trial counsel nor the trial judge had *any way of knowing* that the Supreme Court would act as it did. (*People v. Vinson* (1969) 268 Cal.App.2d 672, 675.) "A contrary holding would place an unreasonable burden on defendants to anticipate *unforeseen* changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule ... would be changed on appeal." (*People v. Kitchens* (1956) 46 Cal.2d 260, 263, italics added.)

Philip Morris does not suggest that it had no way of knowing that the United States Supreme Court would issue

an opinion in which it would conclude that liability based upon post-1969 youth-targeted advertising was preempted by federal law. Nor does it suggest that the implicit overruling of *Mangini* by *Reilly* was unforeseen by Philip Morris. Indeed, Philip Morris was a party to the district court case reviewed in *Reilly*, and one of the petitioners in *Reilly*. (See e.g., *Reilly*, *supra*, 533 U.S. 525; *Consolidated Cigar Corp. v. Reilly* (1st Cir. Mass. 2000) 218 F.3d 30.)²³ Thus, Philip Morris may not rely upon the futility of objecting or requesting a limiting instruction.

And we would find no error in allowing Boeken's counsel to argue as he did, even if *Reilly* had been published prior to trial. Boeken's counsel did not argue, as Philip Morris suggests, that the jury should consider such advertisement to justify a greater punitive damage award. Counsel's argument was in response to evidence and argument presented by Philip Morris with regard to youth marketing.

Ellen Merlo, Senior Vice President of Corporate Affairs at Philip Morris, and a member of the management team responsible for community relations, public affairs, and corporate responsibility programs, testified on behalf of Philip Morris that "We sincerely don't want kids to smoke." Merlo claimed that not only did Philip Morris not market to minors, but worked affirmatively to prevent them from smoking. In April 1998, Philip Morris created a new department, its Youth Smoking Prevention Department, which has devoted over \$100 million per year to anti-smoking measures. For example, since the Superbowl reaches the largest number of 9 to 14 year-olds in the season, Philip Morris ran anti-smoking ads on the telecast of the 2000 Superbowl. While much of the money is spent on advertising, the department

²³ We take judicial notice on our own motion of the United States Supreme Court docket in *Lorillard Tobacco Co. v. Reilly*, Case No. 00-596. (See Evid. Code, § 452, subd. (d).) The docket may be viewed at <http://www.supremecourtus.gov/docket/00-596.htm>.

also funds grants, such as to 4-H, to develop youth anti-smoking programs. Philip Morris also undertook a campaign to urge parents and older siblings to be more responsible in where they leave their tobacco and not to purchase cigarettes for minors.

Merlo also claimed that Philip Morris punishes retailers who have been convicted or fined for selling its products to minors. Philip Morris has agreements with retailers under which the retailers are paid to display and sell its products. Upon the first conviction, Philip Morris withdraws payment for one month; upon the second conviction, four months; and upon the third conviction, two years. Since 1995, several thousand retailers have been punished, some of them losing thousands of dollars in withheld payments.

In addition, Merlo testified, Philip Morris advocates a policy of keeping its merchandise behind the counter, discourages retailers from placing cigarettes or advertising at children's eye level or near the candy, does not sell its products by mail or over the internet, since it is impossible to check the age of the buyer, and it has stopped giving free samples.²⁴

Merlo explained that in 1997, when Mike Szymanczyk became CEO of Philip Morris U.S.A., Philip Morris changed its approach, in order to "become responsible and to earn back some credibility." He therefore adopted the Surgeon General's position, created a mission with a "set of core values that would guide the company and then to set some very specific goals ... as we moved forward." The new mission statement expressed the company's goal "to be the most responsible, effective and respected developer, manufacturer [and] marketing the best quality tobacco products available to adults who choose to use them." One way to attain that goal

²⁴ Sampling was outlawed in California in 1995. (Health & Saf. Code, § 11895.)

is to take "a proactive and active stance in dealing with the issue of youth smoking prevention."

In closing argument, counsel for Philip Morris urged the jurors not to decide the case based upon anger, bias, or emotion, or to "go into that jury room and hammer [Philip Morris]," because, he argued, Philip Morris is "doing things differently now." Counsel referred to Merlo's testimony, acknowledged that the company had made mistakes over the years, and pointed out that it was trying very hard to make changes and to sell its product in a responsible way.

Thus, without expressly mentioning punitive damages, it appears that the strategy of Philip Morris was to show there was no need for punishment, since it had changed the policies that led to Boeken's nicotine addiction. Philip Morris may not complain of the admission of evidence it offered itself. (*Gjurich v. Fieg* (1913) 164 Cal. 429, 433.)

Because Philip Morris presented the testimony of Merlo, Boeken's counsel was entitled to comment upon the evidence in argument. (See *People v. Mincey* (1992) 2 Cal.4th 408, 446.) This is just what Piuze did when he said "[I]f Philip Morris gives up targeting teenage smokers, Philip Morris will literally be out of the tobacco business," and, "Philip Morris isn't giving up targeting teenage smokers." Just preceding the comments, and not quoted by Philip Morris, Piuze said, "I hope to be able to show ... that *despite evidence here and proclamations here from Philip Morris to the contrary*, they cannot give up targeting teenage smokers." (Italics added.)

Similarly, Philip Morris complains of comments at page 5900 of the reporter's transcripts, although it does not quote them in its briefs, where Piuze urged the jury not to believe Philip Morris's evidence. He said, "Ellen Merlo saying, we will stop selling to kids and targeting kids is like that guy in 1954 saying, if this product is harmful, we'll stop, we'll [get]

out of the tobacco business."²⁵ Philip Morris also complains about the argument on pages 6222, 6224, and 6225 of the reporter's transcript. Again, Piuze was urging the jury not to believe Merlo's testimony.

Where a party has "'opened the door'" on an area, it is estopped from complaining that its opponent has profited by it. (*Morris v. Frudensfeld* (1982) 135 Cal.App.3d 23, 32; see also, *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1555.)

Counsel is accorded wide latitude in arguing his case to a jury, and "'has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom.''" (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 798-799 (*Grimshaw*)). Thus, even if Philip Morris had objected to the remarks, the court would not have erred by overruling the objection.

6. Impeachment with Felony Conviction

Philip Morris contends that the trial court abused its discretion in refusing to allow it to impeach Boeken with a 1992 felony wire fraud conviction.

Boeken brought a motion in limine to exclude any reference to his three criminal convictions, one in 1972 for receiving stolen property, one in 1976 for possession of heroin, and the 1992 wire fraud conviction. With regard to the latter, Boeken had been convicted after pleading guilty in a plea bargain to one count of wire fraud as an aider and abettor. (See 18 U.S.C. §§ 1343, 2(a).) He admitted having sold a

²⁵ The 1998 deposition testimony of former Philip Morris CEO Geoffrey Bible in another case was read to the jury. He testified that he did not know whether anybody had died as a result of smoking, and if he thought someone had died because of his product, he would shut down the business.

fraudulent investment in 1987 while employed as a securities salesman.

The motion in limine was granted, *without* prejudice, after which the following exchange occurred:

"THE COURT: At this time, what I will do is I will grant the motion in limine in its entirety as to the felony convictions and they will not be admitted for any purpose, nor will counsel refer to it in any way, either directly or indirectly, through counsel or through any witnesses that may take the stand.

"It's without prejudice.

"If we get very far into any character issues--

"MR. LEITER: And by suggesting we defer it, I hadn't anticipated Your Honor was going to rule.

"THE COURT: I know you did.

"MR. LEITER: Obviously, credibility of the plaintiff is a key issue in the case. Income is a key issue in the case. And the conviction goes to both. And we would like to be heard on both of those issues, either now or at the appropriate time.

"THE COURT: All I can say to you is that I am certainly willing to listen. But based on the information that I have at the present time that's been presented to me in this motion in limine, I looked at it, I thought about it long and hard, balanced the 352 issues, it turns out from what I have seen so far, I am satisfied that I made--that my instincts led me in the right direction and it was correct not to admit this evidence and that it would have been the very effects that 352 is designed to prevent occurring in a trial.

"But at the same time, I haven't seen everything, and there must be a certain amount of openness. But at the present time, this motion is granted."

Despite the fact the ruling was without prejudice, Philip Morris did not attempt to resurrect the issue again until its motion for new trial. It now contends that the court abused its discretion in excluding the conviction for three reasons: it was not too remote; fraud is probative on the issue of credibility; and Boeken's veracity was a "central issue."

The trial court's determination whether to admit or exclude a prior felony conviction for purposes of impeachment was made pursuant to Evidence Code section 352. (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274.) Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"If a proper objection under section 352 is raised, the record must affirmatively demonstrate that the trial court did in fact weigh prejudice against probative value. The trial court need not make findings or expressly recite its weighing process, or even expressly recite that it has weighed the factors, so long as the record as a whole shows the court understood and undertook its obligation to perform the weighing function. [Citations.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 599.) An exercise of discretion under section 352 will be disturbed on appeal only if the trial court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

We agree that a fraud conviction is probative with regard to credibility. But Philip Morris has not shown that its exclusion was arbitrary, capricious, or patently absurd, or that it resulted in a manifest miscarriage of justice. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1124.) Notably absent from Philip Morris's argument is any contention that the probative

value of the conviction might outweigh the consumption of time that would have been taken up by the issue.

7. Juror Misconduct

Philip Morris contends that the trial court erred in removing a juror during deliberations.

The trial court's discretion to discharge a juror who refuses to deliberate is reviewed for abuse of discretion and will be upheld if there is any substantial evidence supporting the ruling, so long as the juror's refusal to deliberate appears in the record as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474-475.)

On the morning of May 23, 2001, one day into deliberations, the foreperson sent out two notes to the judge stating, among other things: "We ... need instruction regarding Juror # 5 ... who is not participating in the discussion. She sits away from the table and reads her bible instead of contributing to the group conversation"; and, "Can we discuss the distraction regarding Juror # 5.... She is not seating [*sic*] with us during the discussion. She instead chooses to read her bible and does not contribute to the group conversation."²⁶

In response to the note, the court reread to the jury the following excerpt from BAJI No. 15.52: "All jurors should participate in all deliberations."

Later, the foreperson sent out another note. "Per the court's instruction, Juror No. 5 is still not willing to sit around the discussion table and participate. She chooses to continue to read her bible, and it is upsetting the other jurors. This distraction is making it difficult for us to deliberate. I

²⁶ The record is not clear on the timing and sequence of the various notes.

and a few other jurors have spoke [sic] with [Juror No. 5] about this."

The court then questioned Juror No. 5 separately in chambers. She denied that she had been reading her Bible during deliberations, although she kept it in front of her. She admitted that she did not sit "all the way up" at the table, but denied that she sat away from the table, failed to listen, or slept during deliberations.

Juror No. 5 explained to the court that questions had been raised in the jury room about her addiction to morphine, and she found that avoiding eye contact helped her to avoid painful memories. She did this for "[her] own sanity." She then admitted that she had been sitting in the corner, explaining that she could not be expected to sit there and "giggly-gaggly play little games," because she was "not that hypocritical."

The trial judge urged Juror No. 5 to participate, to explain her concerns to the other jurors, and to ask them to be courteous, since they probably would attempt to get along if they understood her feelings. Juror No. 5 responded that she got along with individual jurors, but "now it is like them against me." The judge explained that deliberating means listening, sharing her views, and participating. Juror No. 5 replied, "I totally agree. I have attempted to do that." She agreed to go back in, talk to the other jurors, and to try to "square it away."

Later that day, however, the foreperson sent out another note, which read: "Wish to speak with the judge on a one and one basis regarding [Juror No. 5]. We feel that she is being disruptive and have [sic] shown animosity towards some of the jurors who has [sic] spoken to her regarding the reading and participation"; and, "Per the court's instruction, Juror No. 5 is still not willing to sit around the discussion table and participate. She chooses to continue to read her bible, and it is upsetting the other jurors. This distraction is making it dif-

ficult for us to deliberate. I and a few other jurors have spoke [sic] with [Juror No. 5] about this."

The court then undertook to question each juror individually in chambers. The judge was careful to caution each juror not to reveal the contents of deliberations, and asked for any comments about the information he had received regarding some difficulty concerning one of the jurors.

Juror No. 2 reported that the trouble began after Juror No. 5 became angry when she was not elected foreperson. It appeared to Juror No. 11 that Juror No. 5's personality totally changed once the foreperson was picked. Juror No. 6, the foreperson, reported that Juror No. 5 participated until she failed to win election as foreperson. She then became hostile, and warned Juror No. 6 that she would "shut it down" if she were not left alone.

Six jurors reported that Juror No. 5 would sit with her back turned against the other jurors, and Juror No. 5 admitted turning her chair around and sitting with her back to the other jurors on both days of deliberations.

Juror No. 1 reported that Juror No. 5 would not sit with the others, and that she either read her book or appeared to sleep during deliberations. Five more jurors reported either that Juror No. 5 appeared to be sleeping much of the time, or she sat with her eyes closed.

Jurors No. 7, 8, and 9 reported that Juror No. 5 never looked at the exhibits, and the latter two reported that she did not review her notes. Eleven jurors reported that Juror No. 5 read her book while the others deliberated. Juror No. 5 admitted that she read a novel (not the Bible) during deliberations, although she then claimed that she was not actually reading. Juror No. 11 thought that Juror No. 5 was, in fact, reading, since she smiled occasionally while looking at her book, and the smile obviously did not relate to any discussion among the other jurors.

Ignoring the reports we have just summarized, Philip Morris points to comments by several jurors, including Juror No. 5, which would have supported a contrary resolution of the issue by the trial court. But we must accept the trial court's resolution of credibility issues and factual conflicts, unless they are not supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

Philip Morris also attaches to its opening brief a declaration of Juror No. 5 dated June 7, 2001, and a letter from one of the other jurors, posted on the Internet on June 23, 2001. These exhibits add nothing to the pre-verdict evidence other than the mental processes of the two jurors. They may not be used to impeach the verdict. (See Evid. Code, § 1150.)

Philip Morris suggests that the facts of this case are similar to those of *People v. Bowers* (2001) 87 Cal.App.4th 722 (*Bowers*), which were held to justify a reversal. (See *id.* at p. 735.) We disagree. In *Bowers*, only one other juror reported that the discharged juror had slept, and there was no evidence of how long or how frequently. (*Id.* at p. 731.) Here, *all* the other jurors reported that Juror No. 5 appeared to sleep or read throughout the two days of deliberations.

In *Bowers*, behavior reported as inattentiveness consisted of the juror's habit of walking around with his arms crossed and refusing to respond, as a means of expressing that he did not agree with the other jurors' evaluation of the evidence. (*Bowers, supra*, 87 Cal.App.4th at pp. 730-731.) Here, substantial evidence established that Juror No. 5 separated herself physically from the other jurors, did not pay attention to their deliberations, and instead, slept or read a novel, the Bible, or both, throughout the two days during which she was a member of the deliberating jury.

We conclude that such circumstances support a finding of a "demonstrable reality" that Juror No. 5 refused or was unable to deliberate, and that the trial court did not, therefore,

abuse its discretion in discharging her. (See *People v. Cleveland*, *supra*, 25 Cal.4th at p. 484.)

8. Punitive Damages

Philip Morris moved for a new trial on the jury's award of \$3 billion in punitive damages. The trial court denied the motion, conditioned upon Boeken's acceptance of a reduction of punitive damages to \$100 million. Boeken accepted the reduction. Philip Morris contends that even the reduced punitive damage award is excessive, under both California law and the United States Constitution. In her cross-appeal, Boeken contends that the trial court erred in reducing the award. We begin by reviewing the applicable law.

In California, punitive damages may be awarded by a jury where clear and convincing evidence establishes a defendant is guilty of "oppression, fraud, or malice ... for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).)

"The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts. [Citations.]" (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 928, fn. 13.) *Neal* reiterates the California standard to determine if an award is excessive:

"As we pointed out in *Bertero v. National General Corp.* [(1974)] 13 Cal.3d 43, our review of punitive damage awards rendered at the trial level is guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorable to the judgment, indicates were rendered as the result of passion and prejudice' [Citation.]" (*Id.* at p. 927, italics added.)

Neal listed three factors to consider in reviewing whether an award is excessive: (1) the *reprehensibility* of the acts of the defendant in light of the record as a whole; (2) the amount of *compensatory damages* awarded; and (3) the *wealth* of the particular defendant. (*Neal, supra*, 21 Cal.3d at p. 928.) These factors were reiterated in *Adams v. Murakami* (1991) 54 Cal.3d 105, 109-110.

In California, a trial court reviews a motion challenging the excessiveness of an award of punitive damages similar to other motions for new trial, as a "thirteenth juror": "The trial court is in a far better position than an appellate court to determine whether a damage award was influenced by 'passion or prejudice.' (Code Civ. Proc., § 657.) In reviewing that issue, moreover, the trial court is vested with the power, denied to us, to weigh the evidence and resolve issues of credibility. [Citation.]" (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.) We review the trial court's determination for an abuse of discretion. (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 858, disapproved on another ground in *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15.)

The United States Supreme Court has also provided three "guideposts" for such review: "(1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 440.)

In connection with a federal due process challenge, trial and reviewing courts conduct *de novo* review. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra*, 532 U.S. at p. 440.)

Our Supreme Court, in *Adams v. Murakami*, *supra*, 54 Cal.3d at page 112, has noted the difficulty in addressing the issue of excessiveness of punitive damages: "The determination of whether an award is excessive is admittedly more art than science. 'The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences.' [Citation.]" (*Id.* at p. 112.)

Utilizing the foregoing principles, we review the evidence and the trial court's determination.

(1) *Reprehensibility of Conduct*

The trial court, reviewing the motion for new trial pursuant to California and federal law, concluded that "Philip Morris's conduct was in fact reprehensible in every sense of the word, both legal and moral." We agree.

In California, it has been held that intentionally marketing a defective product knowing that it might cause injury and death is "highly reprehensible." (*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 755.) The court in *Romo* found Ford's conduct justified a punitive damage award of approximately \$23 million. Another court, also reviewing the actions of Ford Motor Company in connection with the marketing of a defective product, affirmed an award of \$3.5 million in punitive damages with the following language: "[T]he conduct of Ford's management was reprehensible in the extreme. It exhibited a conscious and callous disregard of public safety in order to maximize corporate profits." (*Grimshaw*, *supra*, 119 Cal.App.3d at p. 819.)

The most recent United States Supreme Court decision on punitive damages, *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, identified several subsidiary factors which guide the determination of the degree of reprehensibility: (1) whether "the harm caused was

physical as opposed to economic"; (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) whether "the target of the conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*Id.* at p. 419.) The court then noted: "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. [Citation.]" (*Ibid.*)

The court also held that "repeated misconduct is more reprehensible than an individual instance of malfeasance," "a recidivist may be punished more severely than a first offender," so long as "the conduct in question replicates the prior transgressions." (*State Farm, supra*, 538 U.S. at p. 423.) Also, evidence of great profit may be relevant to show greater degree of reprehensibility. (*Id.* at p. 423.)

It also concluded that due process prohibits the imposition of punitive damages for unrelated unlawful acts committed outside of the state's jurisdiction, or acts that were lawful in the jurisdiction where they occurred. It explained: "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." (*State Farm, supra*, 538 U.S. at p. 423.) *But, similar out-of-state conduct may be relevant to the issue of reprehensibility when it demonstrates the deliberate-*

ness and culpability of the acts committed in the state where they are tortious, so long as the conduct has a "nexus to the specific harm suffered by the plaintiff." (*Id.* at p. 422, italics added.)

Utilizing the five factors listed in *State Farm*, all show a high degree of reprehensibility and weigh in favor of the jury's conclusion that a substantial punitive damage award was appropriate in this case. The evidence supports the conclusion that Boeken's injuries were caused by Philip Morris's fraud and defective product, and were physical, not merely economic. Philip Morris's conduct was repeated over a period of almost 50 years with an indifference to the health or safety of Boeken and others, and Boeken was physically and psychologically vulnerable, and eventually, economically vulnerable.

Philip Morris manufactured a dangerous product, knowing that it was a dangerous product -- one that caused addiction and disease, and it added chemicals to the product to make it more addictive and easier to draw into the lungs, thus making it *more* dangerous. At a young age, Boeken was drawn to the product and to the Marlboro brand with misleading advertising specifically targeted to male adolescents. He was kept smoking with misleading statements and falsehoods about smoking, disease, and addiction, the believability of which was enhanced by addiction; and Boeken's addiction was ensured by increasing Marlboro's nicotine delivery.

Philip Morris contends that its fraud cannot be deemed reprehensible, because the health risks of smoking were public knowledge for decades; because the State of California protected cigarette companies from liability for the ten-year period of former Civil Code section 1714.45; and because its tortious conduct was "remote," as shown by the trial court's instruction to the jury limiting liability for Philip Morris's

fraudulent concealment to conduct that occurred prior to 1969.

We cannot agree with Philip Morris's suggestion that section 1714.45 makes its conduct less reprehensible, on the ground that it provided immunity from liability for fraud and dangerous product under the facts of this case. Philip Morris added urea to make Marlboros more addictive, and flavorings to make it easier for the smoke to reach the lungs. Section 1714.45, as we have discussed, provided immunity only for *unadulterated* tobacco products. (See *Naegele, supra*, 28 Cal.4th at pp. 864-865; *Myers, supra*, 28 Cal.4th at p. 837.)

The health risks of smoking may have been public knowledge for decades, but given the evidence of the false controversy created by Philip Morris, the adulterations added to the cigarettes, the nature of addiction, the fact that Boeken failed to understand and appreciate the risks of smoking, and Philip Morris's marketing of so-called light cigarettes, knowing that they are more dangerous than ordinary consumers expect, this argument fails.

In addition to fraud, the evidence establishes that Philip Morris acted with a conscious disregard of consumer health and safety in the manufacture and marketing of a dangerous product, and intentionally took advantage of the consumer expectation that "light" cigarettes were safer.

Philip Morris knew that there was no reason to believe Marlboro Lights or Ultralights were any safer than its Reds. Compensation has been described in scientific literature for 40 years, and Philip Morris's own research found no reduction in tar delivery for Marlboro Lights over regular cigarettes, but Philip Morris has only just recently initiated a study of human smokers to measure how much tar they actually take in. And although Philip Morris's laboratories were "state of the art," its studies of biological activity, using ac-

tual cigarettes that it markets, did not begin until 1999 or 2000.

Further demonstrating a conscious disregard for consumer safety, Philip Morris was *still* marketing "light" cigarettes at the time of trial, knowing that they may increase the risk of more serious cancers. And Philip Morris was still adding urea to Marlboro tobacco, causing more nicotine to be delivered more quickly to the smoker, as well as flavorings to create bronchodilators to open up the lungs.

The Marlboro Lights or Ultralights smoked by Boeken resulted in adenocarcinoma of the lung, which spread to his brain and spine. Since 1959, it has been known that smoking is the cause in more than 90 percent of the cases of this aggressive form of lung cancer. But Philip Morris tested carcinogenicity in secret, in a lab out of the country. There, a less carcinogenic Marlboro cigarette was developed in 1979, using reconstituted tobacco, but it was never marketed, and senior Philip Morris's scientist, Dr. Osdene, received all reports from the secret lab at his home and destroyed them after reading them.

At the time of trial, about 16 million people in the United States smoked Marlboros. Among teenagers, Marlboro is the brand of choice. Marlboro cigarettes are the best selling brand in the country, and the Golds, so-called light Marlboros, outsell the regular Reds. Experts believe that the increase in lung adenocarcinoma, a more aggressive and fast-spreading cancer, is attributable to low-tar cigarettes, which most smokers believe to be less hazardous. Nevertheless, Philip Morris continued to market light Marlboros.

A smoker's risk of death from all smoking-related causes is 18 to 36 percent, and the longer one smokes, the greater the risk. In 1993, a report of the Environmental Protection Agency concluded that second-hand smoke kills 3000 non-smoking Americans annually. Dr. Carchmann admitted that of the people who die every year in this country from smok-

ing-related disease, 200,000 are attributable to Philip Morris products.

Philip Morris contends that harm to others cannot be considered in a punitive damage analysis. But as we have previously explained, similar out-of-state conduct may be relevant to the issue of reprehensibility when it demonstrates the deliberateness and culpability of the acts committed in the state where they are tortious, so long as the conduct has a "nexus to the specific harm suffered by the plaintiff." (*State Farm*, *supra*, 538 U.S. at p. 422.)²⁷

Philip Morris contends that its conduct in other states consisted solely of lawfully selling cigarettes, and that it was not shown to be similar to that which injured Boeken, because there was no evidence that it caused any injury to *specific* persons in other states. We find nothing in *State Farm* that requires proof of injury to specific persons other than the plaintiff, wherever they reside, when the conduct in question is identical, as it was here, since the conduct that injured

²⁷ In a related argument raised for the first time in its reply brief, Philip Morris argues that the trial court should have instructed the jury using language similar to that from *State Farm* "that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." Philip Morris forfeited this issue by failing to request such an instruction from the trial court. *State Farm* was not the first case enunciating this concept. It was first addressed in *BMW*, where the Court stated that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 572 (*BMW*)). Thus, *BMW* provided sufficient authority to enable Philip Morris to draft and request an appropriate instruction. The trial court was not required to draft it for Philip Morris. (See *Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 701.) And a party may not complain on appeal of a failure to give an instruction it did not request. (*Linzey v. Delgado* (1966) 246 Cal.App.2d 504, 509.)

Boeken was not confined to California. “[R]epeated misconduct is more reprehensible than an individual instance of malfeasance,” “a recidivist may be punished more severely than a first offender,” so long as “the conduct in question replicates the prior transgressions.” (*State Farm, supra*, 538 U.S. at p. 423, quoting *BMW, supra*, 517 U.S. at p. 577.)

The very conduct that injured Boeken was directed at all smokers in the United States, repeated over many years with knowledge of the risk to human life and health, and is probative of intentional deceit. The national marketing of a defective product, knowing that ordinary consumers expect it to be less hazardous, knowing that thousands of people will die due to their addiction, is probative of a willful and conscious disregard of the danger to human life. (See *State Farm, supra*, 538 U.S. at pp. 423-424.) We find that a sufficient nexus has been shown here with Philip Morris’s conduct in the other states, whether lawful or unlawful, to consider the evidence on the issue of reprehensibility. (See *id.* at p. 422.)

Having concluded that Philip Morris’s conduct is “extremely reprehensible,” as in *Romo v. Ford Motor Co.*, and that there is sufficient evidence supporting all five reprehensibility factors under *State Farm*, a substantial punitive damage award was justified. We turn to the second element under each test: the ratio of compensatory damages to punitive damages.

(2) Ratio of Compensatory to Punitive Damages

Here, the original punitive damage award of \$3 billion is approximately 540 times the compensatory damage award of \$5.5 million. The trial court concluded that such a ratio was not “unprecedented,” citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, but it noted, as argued by Philip Morris, that most cases addressing punitive damages in the context of an award of compensatory dam-

ages exceeding \$1 million have found ratios of 4 to 1 and 3 to 1 more appropriate.

Under California law an award is presumed to be the result of passion and prejudice where it is grossly disproportionate to compensatory damages. (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928; *Roesner v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 750.) "[I]n general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small." (*Neal, supra*, 21 Cal.3d at p. 928.) A disparity of 63:1 has been presumed to have resulted from passion and prejudice, even where the defendant was a wealthy national corporation and the award represented an acceptable "one fourth of one percent of [the defendant's] net assets, and only three and one-half days of its net income." (*Roesner v. Sears, Roebuck & Co., supra*, 110 Cal.App.3d at p. 750.)

In *State Farm*, the United States Supreme Court observed that in *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S. 1 at pages 23-24, it had "concluded that an award of more than four times the amount of compensatory damages *might* be close to the line of constitutional impropriety. [Citation.]" (*State Farm, supra*, 538 U.S. at p. 425, italics added.) And the Court was of the opinion that it should be "obvious" that "[s]ingle digit multipliers are more likely to comport with due process, while still achieving the State's goal of deterrence and retribution, than awards with ratios in range of 500 to 1, [citation]." (*Ibid.*)

It appears the Supreme Court in *State Farm* meant for ratios to be *instructive*, not *binding*. It refused, as it has in the past, "to impose a bright-line ratio which a punitive damages award cannot exceed," observing that it had "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award" [citation]." It

stated that "there are no rigid benchmarks that a punitive damages award may not surpass." (*Id.* at pp. 424-425.)

The Supreme Court suggested examples of circumstances that might justify ratios greater than previously upheld, such as "where 'a particularly egregious act has resulted in only a small amount of economic damages,'" or "where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" (*State Farm, supra*, 538 U.S. at p. 425, citations omitted.) But it acknowledged that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*Id.* at p. 425.)

The Court also stated that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (*State Farm, supra*, 538 U.S. at p. 425.) The Court's holding was expressly based on the fact that, in that case, "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries." (*Id.* at p. 426.)

Boeken contends that the reasoning of *Mathias v. Accor Economy Lodging, Inc.* (7th Cir. 2003) 347 F.3d 672, justifies a larger ratio, because there, the defendant's very reprehensible conduct caused bed bug bites, not grave physical injury or death, and a 37:1 ratio was upheld. A higher ratio was justified in that case, however, not solely because of reprehensibility, but also because the great wealth of the defendant, compared to the small compensatory award, might otherwise permit the wealthy defendant to make it economically infeasible to bring the action. (*Id.* at pp. 676-677.)

Relying upon the Supreme Court's suggestion in *State Farm* that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," (*State Farm, supra*, 538 U.S. at p. 425; see *BMW*,

supra, 517 U.S. at p. 582), Philip Morris contends that the compensatory award of \$5,539,127 was so substantial as to justify only a 1:1 ratio. A similar argument was made to the trial court which stated: "In the end, this argument leads to the unsupportable proposition that those who commit the most devastating and reprehensible wrongs are given caps on their punitive damages exposure which those who commit lesser wrongs do not receive -- a proposition standing the legitimate and necessary role of punitive damages on its head."

(3) *The Wealth of Philip Morris*

The third prong of the test in California is the wealth of the defendant: "[O]bviously, the function of deterrence ... will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." (*Neal, supra*, 21 Cal.3d at p. 928.)

Both California and the federal authorities agree that profits earned from tortious activity which supports an award of punitive damages are appropriately considered in the amount awarded. (*Haslip, supra*, 499 U.S. at p. 22; *Neal, supra*, 21 Cal.3d at pp. 928-929.)

State Farm did not disavow the use of wealth in assessing punitive damages. The principle of federalism remains in play: "[E]ach State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." (*State Farm, supra*, 538 U.S. at p. 422.) What *State Farm* does say is: "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*Id.* at p. 427.) And *State Farm* recognizes that deterrence is one of the primary purposes of punitive damages. (*Id.* at p. 416.)

California courts have routinely upheld punitive damage awards which amounted to a percentage of net worth from .005 percent (*Grimshaw, supra*, 119 Cal.App.3d at p. 820), to 5 percent (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166), and not exceeding 10 percent. (*Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515.)

Here, the trial court made the following findings regarding wealth:

"Philip Morris offered no evidence of its financial condition and rested entirely on the state of plaintiff's evidence. Plaintiff's expert economist, Robert Johnson, testified essentially un rebutted, that Philip Morris's domestic tobacco company has a value of between \$30 and \$35 billion. The worth of the company's domestic operation is not reported separately in the parent company's annual report and must be broken out using estimations involving income and revenue. California law permits using defendant's wealth, income, or both to estimate financial condition. *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451; *Weatherbee v. United States Ins. Co. of America* (1971) 18 Cal.App.3d 266. A strict accountant's 'assets vs. liabilities' calculation is not required, and Philip Morris offered no expert testimony at trial rebutting the validity of the methodology used by Mr. Johnson.

"While Robert Johnson offered evidence indicating a potential value exceeding \$35 billion, ample evidence, uncontradicted by credible contra evidence, exists on the record to support a finding that defendant's current worth at the time of trial was between \$30 and \$35 billion. Exercising its independent judgment, the Court finds this fact true

for the purposes of assessing the reasonableness of the jury's punitive damages award.

"Plaintiff suggests, and the Court agrees, that California cases tend to limit punitive damages awards to sums generally in a range under 10% of a defendant's total worth. [Citation.] As with punitive-to-compensatory ratios, this figure is not a matter of mathematical certainty or invariant. [Citations.] The jury's award here is within the percentage of worth guideline generally allowed by California law."

Given the discretion vested in the trial court, we must give great deference to the trial court's findings in this regard. (*Mosesian v. Pennwalt Corp.*, *supra*, 191 Cal.App.3d at p. 858.) That being so, the trial court is correct that the award of \$3 billion in punitive damages falls within the guidelines of California law, being just 10 percent or less of net worth.

But an inference arises that the jury acted out of passion and prejudice if the award exceeds the amount needed to accomplish the goal of punishment and deterrence. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1259.)

(4) *The Difference Between Punitive Damages and Civil Penalties*

The third guideline under federal law is the "difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm*, *supra*, 575 U.S. at p. 418; *BMW*, *supra*, 517 U.S. at pp. 574-575.)

The trial court found little help in this guideline. "Finding analogous penalty provisions sanctioning frauds leading to wrongful death is a difficult, if not impossible, undertaking.

Plaintiff points to the California Unfair Competition Act proscribing 'any unlawful, unfair or fraudulent business act or practice....' Cal. Bus. & Prof. Code § 17200. Using the potential multiples achievable for discrete antitrust violations prescribed by the California Unfair Trade Practices Act, a different law, plaintiff attempts an analogy assuming the sale of each pack of cigarettes as a single violation, leading to staggering potential fines at \$1000 per sale. Plaintiff also cites Penal Code provisions purporting to permit fines of \$10,000 for each violation, and separate provisions allowing courts to fine employees individually for their misconduct. Philip Morris offers no analogies other than to criticize those proposed by plaintiff. [¶] The Court has not on its own found any convincing analogous civil or criminal penalties that could be imposed for comparable misconduct, and considers this factor relatively neutral in assessing the reasonableness of the jury's punitive damages award here."

The Supreme Court has referred to "a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." (*State Farm, supra*, 538 U.S. at p. 425; citing *BMW, supra*, 517 U.S. at p. 581, and fn. 33.)

The California Legislature has declared that "keeping children from beginning to use tobacco products in any form and encouraging all persons to quit tobacco use shall be among the *highest priorities* in disease prevention for the State of California." (Health & Saf. Code, §§ 118950, subd. (a)(11), 104350, subd. (a)(9), italics added.) To this end, California imposes civil penalties on persons who furnish cigarettes to minors. (Bus. & Prof. Code, § 22958.) It is also a crime, and carries a possible fine of \$1,000 after the third offense. (Pen. Code, § 308, subd. (a).)

California also imposes civil fines for "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) Although the record contains no evi-

dence of typical fines for unlawful or unfair business practices, we may consider not only civil penalties that are actually imposed, but those that are *authorized* in comparable cases. (*State Farm, supra*, 538 U.S. at p. 418.) A \$2,500 civil penalty may be assessed for each violation. (Bus. & Prof. Code, § 17206, subd. (a).) Boeken smoked two and one-half packs of Marlboros per day for 43 years, approximately 40,000 packs, as a result of Philip Morris's continuing fraud. If the sale of each pack to Boeken were considered a violation, fines authorized by statute could amount to nearly twice the \$100 million in reduced punitive damages confirmed by the trial court in this case.

We agree with the conclusion of the trial court. This is basically a case of wrongful death resulting from fraudulently marketing a defective product. No analogous civil or criminal penalties have been identified against which to measure the award of punitive damages.

(5) *Application of the Law to the Facts*

"[T]he more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." (*Neal, supra*, 21 Cal.3d at p. 928.)

The trial court's decision is succinct: "After balancing all the relevant considerations, the Court finds that the jury's punitive damage award was legally excessive because it produced an excessive punitive-to-compensatory ratio. While the Court cannot know with certainty what ratio is exactly correct, it finds that a ratio of approximately 20-to-1 is appropriate in this particular circumstance. No party disputes the rationality of the jury's compensatory award of \$5,539,127, and the Court, exercising its independent[] judgment determines from all the evidence that a punitive award of \$100 million is a reasonable sum to be awarded against Philip Morris in these circumstances."

We recognize the large discrepancy between the compensatory and punitive damages, and the deference to what the trial court's determination on a motion for new trial is due. Nevertheless, we must exercise our own *de novo* review of the amount ordered by the trial court. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, *supra*, 532 U.S. at p. 440.)

We have found Philip Morris's 40 years of fraud and its *continuing* conscious disregard for the safety and lives of the consumers of its so-called low-tar Marlboros to be "exceptionally extreme." On the other hand, the compensatory damage award was significant. The ultimate question is how much is necessary to deter and punish the activity, a conundrum recognized by our Supreme Court in *Adams v. Murakami*, *supra*, 54 Cal.3d at page 110: "The nature of the inquiry is a comparative one. Deciding in the abstract whether an award is 'excessive' is like deciding whether it is 'bigger,' without asking 'Bigger than what?'" (*Id.* at p. 110.)

The trial court reached its conclusion before *State Farm* had been decided. Although *State Farm* reiterated many principles which had been laid down before the trial court ruled, its discussion regarding ratios shed new light on application of the principles.

Recognizing that history, and applying *State Farm*'s principles, one California court applied a ratio of nearly 4:1, which was, in its opinion, the outer constitutional limit for an *unexceptional* fraud case that caused only economic damages that were "neither exceptionally high nor low," and in which the fraudulent conduct was "neither exceptionally extreme nor trivial." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1057.) Another California court concluded "that an award at the high end of the single-digit ratio spectrum is justified." (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26.) It allowed a ratio of 9 to 1, but the wrongdoing caused no physical injury or death and the

"amount of damages suffered by plaintiffs was relatively small in comparison to the seriousness of the defendants' conduct." (*Id.* at p. 23.)

A multiplier of .05 percent of Philip Morris's net worth of \$30-35 billion, as approved in *Grimshaw* for very reprehensible conduct over just *three* model years of the Ford Motor Company's Pinto automobile, would result in an award of \$17.5 million. (See *Grimshaw, supra*, 119 Cal.App.3d at pp. 775, 792, 820.) *Forty* years of fraud and the *ongoing* (at least at the time of trial) marketing of a deadly and addictive product more dangerous than ordinary consumers expect, merits a greater multiplier.

Evidence indicated that Philip Morris earns a profit of nearly \$15 million per day, and a week's profit, as approved in *Neal, supra*, 21 Cal.3d at page 929, would therefore be nearly \$103 million, very close to the reduced award in this case. Such a figure can be reconciled with the wealth that Philip Morris derives from California. A multiplier of 5 to 10 percent of net worth may be necessary to deter a very wealthy wrongdoer. (See *Weeks v. Baker & McKenzie, supra*, 63 Cal.App.4th at p. 1166; *Storage Services v. Oosterbaan, supra*, 214 Cal.App.3d at p. 515.) Although Philip Morris's profits in California are unknown, evidence suggests that 18 percent of the residents of this very populous state are smokers; Philip Morris enjoys a very large market share; and \$100 million is less than 7 percent of a 1/50th share of Philip Morris's net worth.

Philip Morris contends that since other California juries have returned verdicts including substantial punitive damages for the same conduct, there is less need to further the state's interest in deterrence by approving a greater award. We agree that punitive damages previously imposed against it for the same conduct in other cases, as well as possible future awards, are relevant in determining the amount of punitive damages required to sufficiently punish and deter, so long as

they are shown to have identical issues. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661.)

In support of this point, Philip Morris refers to two judgments taken against it on similar facts. One, *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, has been reversed by the court of appeal. In the other, *Henley v. Philip Morris, Inc.*, No. A086991 (previously published at 114 Cal.App.4th 1429), the Court of Appeal reversed the punitive damage award to \$9 million, conditioned upon the plaintiff's acceptance. But the appellate court in that case was bound by a net worth finding of just \$3.4 billion. Here, the trial court concluded the net worth was in the range of \$30 to \$35 billion.

Philip Morris contends that the state's interest in deterring future wrongs is satisfied by the 1998 Master Settlement Agreement (MSA), asserting that the MSA requires it to pay \$20.5 billion to the State of California over a number of years, beginning in 2000 and ending in 2025, and that such sum is designed to deter Philip Morris from engaging in the same conduct upon which the punitive damage award is based in this case.²⁸

In particular, Philip Morris points out, the MSA prohibits youth targeting, bans virtually all outdoor and transit advertising, prohibits any agreement to limit or suppress research on the health effects of smoking, and requires the dissolution of the Tobacco Institute and the Council for Tobacco Research.

The purpose of the lawsuits underlying the MSA was to recover the states' costs of providing health care to persons with smoking-related illnesses. (*A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.* (2001 3d Cir.) 263 F.3d 239, 241.) The billions of dollars to be paid over the years by the signa-

²⁸ See the MSA online at <http://caag.state.ca.us/tobacco/pdf/1msa.pdf>.

tory tobacco companies are intended to pay such claims, and to fund measures aimed at reducing underage smoking. (Health & Saf. Code, §§ 104555-104557; see *PTI, Inc. v. Philip Morris Inc.* (C.D.Cal. 2000) 100 F.Supp.2d 1179, 1185.)

We note that Philip Morris has referred to no evidence in the record or judicially noticed to support its claim that its share of the payments under the MSA will amount to \$20.5 billion in the period ending 2025. For proof of this assertion, Philip Morris refers only to argument in its memorandum of points and authorities in support of its motion for new trial. This is not evidence. (See *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1090.)

The MSA requires payments from all tobacco companies participating in the settlement, according to their relative market shares. "Market share" is defined by the MSA as a percentage of the total number of cigarettes sold in the 50 United States. "Relative market share" refers to a percentage of the total number of cigarettes shipped in or to the 50 states. Since 1998, Philip Morris has sold fewer cigarettes, which may have reduced its market share. But since there is no evidence in the record of the number of cigarettes sold or shipped by Philip Morris and the other participating tobacco companies, we cannot determine its market share or relative market share, and Philip Morris's figure of \$20.5 billion remains just argument.²⁹

And Philip Morris has not shown from the provisions of the MSA that its purpose is punitive, rather than compensatory, relying instead upon the comments of a Florida court to that effect. (See e.g., *Liggett Group Inc. v. Engle* (Fla.App. 3 Dist. 2003) 853 So.2d 434, 469, review granted May 12, 2004.) Our review of the MSA reveals no provision prohibit-

²⁹ The MSA provides for calculation of shares by an independent auditor.

ing the participating tobacco companies from raising prices to pay the sums called for in the agreement. Since 1998, although Philip Morris has sold fewer cigarettes, it has increased its prices, with the result that revenues were up 47.99 percent in 2000. Philip Morris may simply absorb the cost by raising prices without any competitive disadvantage, because the other participants are likely to do the same, and if so, there may be no punitive or deterrent effect as a result of the payments required under the MSA. (See *Grimshaw, supra*, 119 Cal.App.3d at p. 820; cf., *Neal, supra*, 21 Cal.3d at p. 929, fn. 14.)

We agree, however, that the MSA does provide Philip Morris with an incentive not to misrepresent the health risks of its products, and not to target underage smokers with its misrepresentations, since it prohibits it from doing so. On the other hand, it does not deter Philip Morris from adding flavorings and chemicals that make its product more addictive and easier to take into the lungs. It does nothing to deter Philip Morris from marketing defective "light" cigarettes, knowing that they are more dangerous than the ordinary consumer expects.

Given these other incentives and the final punitive damage award in *Henley*, we conclude that more than a single digit multiplier is not justified. But the extreme reprehensibility of increasing addictiveness by manipulating additives, gaining smokers by fraud, and marketing a product that is more dangerous than ordinary consumers expect, knowing that serious physical injury and death will result in many smokers, does justify a ratio of at least 9 to 1. We round off the figure at \$50 million.

DISPOSITION

The judgment is affirmed in all respects except the amount of punitive damages. The judgment is modified to reduce the punitive damage award to \$50 million, provided Boeken files a timely consent to such reduction in accor-

dance with rule 24(d), California Rules of Court. If no such consent is filed within the time allowed, the judgment is reversed with regard to the amount of punitive damages only, and remanded for a new trial solely upon that issue. Each side is to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

HASTINGS, J.

We concur:
EPSTEIN, P.J.
CURRY, J.

APPENDIX B

Filed 9/21/04

CERTIFIED FOR PUBLICATION

**IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA**

SECOND APPELLATE DISTRICT

DIVISION FOUR

**JUDY BOEKEN, as Trustee, etc.,
Plaintiff and Respondent,**

v.

**PHILIP MORRIS
INCORPORATED,
Defendant and Appellant.**

B152959

**(Los Angeles County
Super. Ct. No.
BC226593)**

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles W. McCoy, Jr., Judge. Affirmed as Modified conditioned upon acceptance of Remittitur.

Arnold & Porter, Murray R. Garnick, Robert A. McCarter, Ronald C. Redcay and Maurice A. Leiter for Defendant and Appellant.

Michael J. Piuze for Plaintiff and Respondent.

BACKGROUND

Richard Boeken commenced this action on March 16, 2000, by filing a ten-count complaint for personal injuries caused by his cigarette addiction.¹ The complaint alleges that Boeken began smoking in 1957, when he was a minor, that he smoked Marlboro and Marlboro Lights, both manufactured by Philip Morris USA, Inc., and that he was diagnosed with lung cancer in 1999.

The cause was tried to a jury under theories of negligence, strict product liability, and fraud, over approximately nine weeks, beginning in March 2001. The jury found that prior to 1969, Philip Morris's product was defective either in design or by failure to warn, and that it caused Boeken's injuries. The jury also found that Boeken was injured as a result of Philip Morris's fraud by intentional misrepresentation, fraudulent concealment, false promise, and negligent misrepresentation; and that he justifiably relied on Philip Morris's fraudulent utterances and concealment. The jury awarded \$5,539,127 in compensatory damages, and assessed punitive damages in the sum of \$3 billion dollars.

Philip Morris's motion for judgment notwithstanding the verdict was denied. On August 9, 2001, Philip Morris's motion for new trial was granted solely upon the issue of punitive damages, and conditionally denied, subject to Boeken's acceptance of a reduction in punitive damages to the sum of \$100 million. Boeken consented to the reduction, and an amended judgment was entered on September 5, 2001. Philip Morris and Boeken then filed timely notices of appeal.

¹ Since Philip Morris and Boeken have both appealed, we shall refer to them by name. Richard Boeken has died, but we shall continue to refer to respondent and cross-appellant as Boeken, since his successor in interest is his widow of the same name, Judy Boeken, trustee for the Richard and Judy Boeken Revocable Trust.

Philip Morris assigns seven categories of error upon which it contends that it is entitled to a reversal. First, Philip Morris contends that Boeken's fraud causes of action remained unproven, because there was insufficient evidence that Boeken heard or relied on any particular false statement or that any reliance was justifiable, and because Philip Morris had no duty to disclose any information found to have been fraudulently concealed.

Second, Philip Morris contends that Boeken failed to prove the elements of product liability, whether measured under the "risk-benefit" test or the "consumer expectations" test, and that the trial court erred in instructing with BAJI No. 9.00.5 instead of 9.00.6.

Third, Philip Morris contends that the trial court erred in refusing to allow it to impeach Boeken with evidence of his 1992 felony conviction.

Fourth, Philip Morris contends that some of Boeken's claims were preempted by federal law regulating cigarette advertising, that the trial court should have excluded evidence and argument related to youth-targeted advertising, and that the trial court should have instructed the jury not to consider such evidence.

Fifth, Philip Morris contends that the trial court abused its discretion by removing a juror during deliberations.

Sixth, Philip Morris contends that Civil Code section 1714.45 bars all or part of Boeken's claims.

Philip Morris's final contention is that the punitive damage award was excessive pursuant to federal and state constitutional law. Boeken's appeal requests that we reinstate the jury's punitive damage award.

Except for the final contention, we reject all of Philip Morris's claims. We agree that the award for punitive damages, even after reduction by the trial court, is excessive and

we affirm the grant of a new trial unless Boeken accepts a further remittitur to the amount of \$50 million.

We shall discuss each contention, but not strictly in the same order it is asserted in the briefs, since some issues are interrelated and thus more easily discussed together.

DISCUSSION

1. *Philip Morris Has Forfeited its Claim that Substantial Evidence Does Not Support the Fraud Verdicts*

Philip Morris contends that there was insufficient evidence of Boeken's reliance on any false statements or non-disclosures to support a finding of fraud. In particular, relying upon *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082 (*Mirkin*), Philip Morris contends that the evidence was insufficient to prove that Boeken was aware of *specific* misrepresentations and acted upon those specific misrepresentations.² Philip Morris also contends that the evidence was insufficient to establish a duty to disclose the concealed information.

The jury found against Philip Morris on the fraud claims of intentional misrepresentation, concealment, false promise, and negligent misrepresentation. Philip Morris challenges only the evidence of its duty to disclose and of Boeken's reliance, not the evidence establishing that it made misrepresentations, made misleading statements and concealed the facts that would have clarified them, or that it made a false promise, all with an intent to defraud. Indeed, Philip Morris does not challenge or even summarize most of the large volume of evidence showing that it was aware of the health hazards and

² In *Mirkin*, the Supreme Court reaffirmed the California rule that a fraud cause of action requires proof of actual reliance, and rejected a fraud-on-the-market theory of reliance advocated by plaintiffs who could not plead or prove that they heard or read any of the alleged misrepresentations, whether directly or indirectly. (*Mirkin*, *supra*, 5 Cal.4th at pp. 1088-1092.)

addictive nature of its tobacco products, or that it undertook a campaign to disseminate falsehoods about smoking and health, and to conceal the truth from the public, including Marlboro smokers such as Boeken, in order to mislead them into believing that their cigarettes were safe and not addictive.

“When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.’ [Citations.]” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The judgment is presumed to be correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) And we presume that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) It is the appellant’s burden to demonstrate that it does not. (*Ibid.*)

In furtherance of its burden, the appellant has the duty to fairly summarize the facts in the light most favorable to the judgment. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) This means that the trial evidence must be summarized in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference, and resolving any conflicts in support of the verdict. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

Further, the burden to provide a fair summary of the evidence “grows with the complexity of the record. [Citation.]” (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.) The record in this case is very complex. The testimony heard by the jury spans 25 of the 40 volumes of reporter’s transcripts. There are also 75 volumes of clerk’s transcripts in the record. Boeken has provided copies of approximately 40 exhibits admitted at trial, but it ap-

pears that there were hundreds more shown to the jury that have not been transmitted to this court.

In addition, portions of Boeken's videotaped deposition were played for the jury, and the parties have lodged a redacted transcript of the deposition, containing what appears to be 300 pages. Videotaped interviews of two other witnesses were lodged at our request, and were not transcribed.

Nevertheless, Philip Morris has provided only the briefest summary of the trial evidence, and has summarized only those facts which support its theories. Almost all of Philip Morris's factual summary consists of evidence favorable to its position -- evidence showing that the dangers of smoking were well known by the public in the 1950s and 1960s; and other evidence from which a jury could reasonably infer that Boeken understood the health risks of smoking.

Even if Philip Morris were to show that the inferences it wishes us to draw are reasonable, we would have no power to reject the contrary inferences drawn by the jury, if they are reasonable as well. (*Crawford v. Southern Pacific Co.*, *supra*, 3 Cal.2d at p. 429.) And a recitation solely of Philip Morris's own evidence is not a fair summary for purposes of determining whether any inferences drawn by the jury are reasonable and supported by substantial evidence. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.)

Philip Morris's failure to provide a fair and complete summary of the evidence supporting the judgment results in forfeiture of contentions based upon the sufficiency of the evidence. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.) We must assume that the missing evidence, including the evidence supplied by missing exhibits, was sufficient to support the jury's findings. (*Supreme Grand Lodge etc. v. Smith* (1936) 7 Cal.2d 510, 513.)

In lieu of tendering the proper summary, Philip Morris suggests that Boeken's counsel, Mr. Piuze, conceded the ab-

sence of evidence of reliance and causation during argument on post-trial motions when he answered, "No," to the following question by the court: "The question is, can the plaintiff point to a single statement made by Philip Morris that ultimately reached Mr. Boeken that can be traced backward through a definite causal link back to Philip Morris?" But the discussion of the matter did not end with that negative response. Piuze went on to explain to the court that the issue of reliance had been proven by *circumstantial* evidence.

"The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814.) Reliance "'may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of [reliance] than ... direct testimony to the same effect.' [Citations.]" (*Id.* at p. 814.)

We conclude that there was no concession, and in order to preserve the issue for appeal, Philip Morris was required to provide a fair summary of the evidence supporting the verdict, whether direct or circumstantial, and it did not do so. In any event, our review has revealed sufficient evidence to support the judgment, as we discuss in the next section.

2. *Substantial Evidence Supports Actual Reliance and Duty Findings*

Philip Morris contends that the evidence was insufficient to establish a duty to disclose information that it fraudulently concealed. At the same time, however, Philip Morris concedes that a duty to speak may arise when necessary to clarify misleading "half-truths." (See *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1082-1083.) But, Philip Morris contends, no duty arises were the plaintiff has not been misled by the half-truths.

Philip Morris confuses the elements of duty and reliance. The duty arises upon the utterances of the half-truths; whether the plaintiff was misled is a question of reliance. (Cf., *Randi W. v. Muroc Joint Unified School Dist.*, *supra*, at p. 1084.) Since Philip Morris does not challenge the evidence of its half-truths, we turn to its contentions with regard to reliance.

Relying on *Mirkin*, *supra*, 5 Cal.4th 1082, Philip Morris suggests that in order to show reliance, Boeken was required to prove that the false or misleading representations were made directly to him and that such proof must include the exact words of the false or misleading representation upon which he relied. We find no such requirements in *Mirkin*.

As stated in *Mirkin*, Restatement Second of Torts section 533 provides: "The maker of a fraudulent misrepresentation is subject to liability ... to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transactions involved." (*Mirkin*, *supra*, 5 Cal.4th at p. 1095.)

The record supports the conclusion of the jury that Boeken was a target of Philip Morris's misrepresentations and that he actually relied upon them. But a meaningful review of the evidence is impossible without a summary of the misrepresentations, misleading half-truths, concealments and false promises presented to the jury. For a better understanding of the issues, we shall start at the beginning of Boeken's case, although some of the facts recited may not be directly relevant to the issue of reliance.

Physicians had the ability in the mid-nineteenth century to diagnose lung cancer. It was a rare disease until some years after the first commercial pre-rolled cigarettes were introduced in the United States in 1913. In the 1930's, there

was a sharp increase in the number of cases diagnosed, and by the end of World War II, its incidence had increased 20-fold.

Boeken's epidemiological expert, Dr. Richard Doll, joined Professor Bradford Hill at the London School of Hygiene in the late 1940's, to conduct the first studies in the United Kingdom to determine the cause of lung cancer, and why its incidence had increased so dramatically. Statistics established the causal connection between smoking and cancer, and Doll and Hill published their results in 1950 in the *British Medical Journal*.³

A Dutch scientist had published a paper in 1948, having reached the same results, and in 1950, a smaller American study was published in the *Journal of the American Medical Association* by American scientists, Drs. Graham and Wynder, also reaching the same conclusion. There had been earlier studies in Germany, but they were not given much weight because the scientific methods used were not optimal. Around 1953, Wynder applied tobacco tars to the skin of mice for several months, and produced skin cancer.

The popular media and the UK Department of Health were not convinced by the Hill and Doll study, and so the two undertook a years-long study of 40,000 smoking and non-smoking English doctors who did not have lung cancer. They thought it would take 5 years, but in 1954, after two years and 35 deaths due to lung cancer, they felt the result was clear and published it immediately in the *British Medical Journal*. It was more widely accepted and changed attitudes considerably.

The American Cancer Society then undertook a two-year study with 190,000 subjects, in order disprove Doll's conclu-

³ Doll has been awarded many honors over the years for his work on tobacco, including knighthood in 1971.

sions; and in 1954, its scientists concluded that the British study had been correct. Even after the publication of Doll's second study and the American Cancer Society study, some leading scientists still questioned the link between lung cancer and smoking, and opinion among scientists was evenly divided until about 1956. At that time, opinion had firmed up quite definitely among scientists that smoking caused lung cancer.

Neil Benowitz, M.D., Boeken's addiction expert, testified that nicotine is addictive, and the most effective way addiction is achieved is delivery by cigarette smoke.⁴ Withdrawal symptoms include irritability, anxiety, insomnia, trouble concentrating, nervousness, and dysphoria (mild depression), and can last for months after quitting. Some symptoms last forever. Smokers use denial and rationalization to continue doing what is obviously or apparently harming them and may acknowledge a general risk, but given a choice of conflicting opinions, they will choose the opinion that supports continued tobacco use.

In 1954, the tobacco industry embarked upon a decades-long strategy to create public doubt about the "health charge" through "vigorous" but not actual denial, such as by claiming that experimental proof was still lacking, and that the statis-

⁴ More specifically, Benowitz testified that nicotine is similar to a hormone called acetylcholine (ACH), which is responsible for nerve communication, and is highly concentrated in the brain. ACH binds to receptors which release other hormones that affect mood and behavior. Nicotine attaches to the same receptors, but in larger amounts, and activates them to a greater extent. Nicotine becomes necessary for the brain to function normally. Smoking creates an aerosol, and when the gas goes directly to the lungs, it delivers the nicotine instantly to the heart and brain, achieving its effect within 15 seconds. This immediate reinforcement encourages addiction. Thus, the smoking (of any addictive substance) is the delivery system that causes the fastest addiction.

tics were not to be trusted, because they were poorly obtained or grossly exaggerated.⁵

First, several tobacco companies, including Philip Morris, formed the Tobacco Industry Research Committee (T.I.R.C.), a public relations organization, to counter the "anti-cigarette crusade" by providing "balancing information" regarding "unproven facts."⁶ To announce its formation, it published "A Frank Statement" in newspapers across the country. The "Frank Statement" claimed, "Distinguished authorities point out ... that there is no proof that cigarette smoking is one of the causes [of lung cancer] [and] statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed, the validity of the statistics themselves is questioned by numerous scientists."⁷

According to Dr. Doll, the Frank Statement was a "bald untruth" and a lie. While some scientists had questioned the link, most knew at the time of the Frank Statement that smoking caused lung cancer.

⁵ Philip Morris's knowledge and actions were shown by the testimony of several former employees of the research and development department, which operated several laboratories, and by a series of internal memoranda between company officers assigned to the labs in the 1950s through the 1980's, including Helmut Wakeham, William L. Dunn, T.S. Osdene, and Robert B. Seligman.

⁶ At some time in the late 1950s or early 1960s, the Council for Tobacco Research (CTR) replaced the T.I.R.C.

⁷ The Frank Statement also assured the public that the industry was concerned about the possible health effects of tobacco and was researching the question, and promised that it would inform the public immediately if they found it to be harmful. The promise was false. Philip Morris's own expert, Dr. Carchmann, testified the tobacco industry did not publicly admit that smoking was harmful until approximately 2000.

Tobacco studies continued throughout the 1950s in many countries, including Japan, Denmark, and France. In 1957, the United States Heart and Lung Institute, the National Cancer Institute, National Institute of Health, and American Cancer Society appointed a joint committee to advise on the state of the science, and concluded that smoking was a cause of lung cancer. The Auerbach study, published in 1957, showed pictures of various stages to demonstrate how the risk of lung cancer increased after a certain number of years of smoking.

In 1960, the World Health Organization issued a report stating that smoking was a cause of lung cancer, and an editorial in the *New England Journal of Medicine* stated that no responsible observer could deny the association. Scientists did not yet know what specific substance in cigarette smoke caused lung cancer, but it was proven by 1953 that cigarette smoking caused it by some means, and by 1960, it was indisputable.

Nevertheless, Philip Morris and other tobacco companies continued their campaign of doubt. T.I.R.C. continued its work, issuing press releases, making personal contacts with journalists, providing "favorable" materials for editorials, articles, and columns, and providing assistance to the authors of such books as *You Don't Have to Give up Smoking* and *Smoke Without Fear*.

A 1957 T.I.R.C. press release quoted its chairman and scientific director as saying, "No substance has been found in tobacco smoke known to cause cancer in human beings nor is any specific mouse carcinogen found." The statement was literally true in that the specific mechanism in cigarettes that caused lung cancer was still unknown, but it was misleading, because the cause and effect had been proven.

In the late 1950s, Philip Morris and other tobacco companies formed another trade organization, the Tobacco Institute, to speak on their behalf. The Tobacco Institute issued press releases, such as the 1961 "Tobacco Institute State-

ment," which asserted, among other things, "The repetition by Dr. Wynder of his firm opinions does not alter the fact that the cause or causes of lung cancer continue to be unknown and are the subject of continuing extensive scientific research by many agencies." And a 1962 press release sent to CBS protesting a program on youth smoking, stated, "causes of lung cancer are still unknown."

The statements were false. In 1961, there were a few other established causes of lung cancer, such as asbestos, but the affected industries were taking precautions to protect people from exposure. Ninety percent of lung cancers were shown to be caused by tobacco, and just ten percent by other causes. By 1961, it was known that most lung cancers were the result of tobacco, and there was no cancer researcher at that time who would say that the cause of lung cancer continued to be unknown.

In 1965, the Tobacco Institute issued a press release based upon the "Genetic Theory" of well-known statistician Ronald Fisher, who opined that there was a genetic factor that caused people to want to smoke and that made them susceptible to lung cancer. That theory had been repudiated in studies in the 1950s in Sweden, the United States, and Finland. The press release also referred to the "smoking theory" of lung cancer, even though no serious scientific researcher considered it a legitimate scientific concept in 1965. The United States Surgeon General had already reported the link in 1964.

In the 1950s, the major cigarette companies, including Philip Morris, entered into a "gentlemen's agreement" not to market products as tested for safety, not to use test results to compete, such as by claiming that one company's cigarette has produced less cancer in rats, and not to do animal testing

with regard to cancer. The agreement was in place throughout the 1960s.⁸

In the 1960s, Congress conducted hearings prior to enacting the Public Health Cigarette Smoking Act of 1969. (E.g., 15 U.S.C. §§ 1331, et seq.)⁹ In March 1965, the Tobacco Institute issued a press release in which it described, among other things, the testimony of R.J. Reynolds president Bowman Gray before Congress on behalf of cigarette manufacturers, including Philip Morris, in opposition to the proposed legislation. Gray told Congress that many scientists held the opinion that it had not been established that smoking caused lung cancer or any other disease; that there was a very high degree of uncertainty; and that a great deal more research was necessary before definitive answers could be given.

By the 1950s, tar was and still is thought to contain most of the organic materials that are likely to cause cancer. When cigarettes were unfiltered and contained large particulate matter, they were irritating, which kept smokers from inhaling deeply. The growing use of filtered cigarettes in the 1960s reduced the amount of delivered tar from about 35 to

⁸ In prior testimony read to the jury, Dr. Jan Uydess established that Philip Morris set up a laboratory in Germany to conduct health-related studies, such as on emphysema and toxicity, and effects on animal systems. Philip Morris did not do the research in the United States, because issues relating smoking to health and addictiveness were considered to be very sensitive. The reports from the German lab were sent to senior Philip Morris scientist T.S. Osdene at his home, and he would destroy them after reading them.

⁹ We shall hereinafter refer to this statute either as the Public Health Cigarette Smoking Act of 1969 or simply as the 1969 Act. The 1969 Act required a health warning on every package of cigarettes sold in the United States. (15 U.S.C. § 1333; see generally, *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 515-518, 525 (*Cipollone*), discussed within.)

25 milligrams, and was thought to reduce the risk somewhat, but filters and flavorings, which act as bronchodilators, made cigarettes easier to smoke. The benefits came in the 1950s and 1960s, which saw a reduction from the 35 milligrams in the 1930's, to 25 milligrams. But there has been no benefit from a further lowering of tar beginning in the 1980's to 10 or 15 milligrams. And further reduction of tar in the so-called low-tar or "light" cigarettes has not resulted in a safer cigarette. It has affected only the *location* of lung cancers and the type of cancer that may be contracted.

It has been generally known since the late 1800's that it is difficult to quit smoking. Scientists have known that nicotine is addictive since the 1920s, although the how and the why came later. At the time of the first Surgeon General's report in 1964, however, many thought that in order to be truly *addictive*, a substance had to be intoxicating, to have a severe withdrawal syndrome, and to be associated with antisocial behavior, such as criminality. The 1964 Surgeon General's report defined drug addiction as "a state of periodic or chronic intoxication produced by the repeated consumption of a drug." Since tobacco was extremely difficult to quit, but was not intoxicating and did not involve anti-social behavior, the Surgeon General used the term "habituation . . ."

In 1965, the World Health Organization discarded the term "habituation" in favor of "dependence," which encompassed addiction, and the terms *addiction* and *dependence* were generally used interchangeably after that to mean any compulsive drug use. *Dependence* was defined as giving the use of a substance a higher priority than other things important to the user, like money or health. The intoxication element became obsolete, and *habituation* fell into disuse. By 1988, the Surgeon General's report dropped *addiction*, whether to intoxicating drugs or nicotine, in favor of *dependence*. But the tobacco companies continued urging obsolete terminology through misleading statements to the public, according to Benowitz.

Internal memoranda demonstrate that as early as 1959, Philip Morris recognized that "[o]ne of the main reasons people smoke is to experience the physiological effects of nicotine on the human system"; and that Philip Morris researchers knew no later than 1959 that addiction was a probable reason why people smoked. A 1969 memorandum shows that Philip Morris's scientists recognized that nicotine was a drug, but feared regulation by the Food and Drug Administration should this knowledge become public.¹⁰

Dr. William Farone, who testified for Boeken, was hired in the mid-1970s by Philip Morris for his expertise in colloid chemistry, which relates to aerosols, such as smoke. It was already commonly understood among the Philip Morris scientists at the time he arrived at its laboratory in 1976, that nicotine was addictive. On several occasions, Dr. Osdene described his mission as one to "maintain the controversy," which Farone understood to mean creating doubt whether nicotine was addictive and whether smoking caused disease.

An internal memorandum shows that by 1972, Philip Morris recognized that the more nicotine a cigarette delivered, the greater its market. By then, the Marlboro brand was outselling the popular brands of earlier years.¹¹ A competitor, R.J. Reynolds, conducted a study to determine why, and found that the PH of Marlboro smoke was much higher than

¹⁰ Philip Morris attorneys were concerned that research amounting to tacit acknowledgement that nicotine was a drug would be "untimely" because of a legislative effort to transfer authority over tobacco to the FDA. In a 1980 internal memorandum, Robert B. Seligman, Osdene's successor as vice president of research and technology, suggested that Philip Morris continue to study the "drug nicotine" to stay abreast of developments with an active research program, but cautioned, "we must not be visible about it," since the attorneys would "likely continue to insist upon a clandestine effort."

¹¹ Marlboro is still the best selling brand in this country.

the smoke from any of its brands. The higher the PH in cigarette smoke, the more free-base nicotine is delivered to the smoker. Ammonia raises the PH level, and occurs naturally in tobacco, but Philip Morris added urea to Marlboro tobacco, which increases the release of ammonia into the smoke.

In 1977, when Philip Morris scientist Carolyn Levy began to study the effects of nicotine withdrawal, her supervisor, W.L. Dunn, suggested to Osdene that he should "bury" any results, should they show similarities to morphine and caffeine. According to Farone, in 1984 Philip Morris shut down some research programs in order to eliminate research that could show that cigarettes were addictive or that could prove that they cause cancer; senior management no longer wanted to do research that could be used against Philip Morris.

Paul Mele, Boeken's expert in behavior pharmacology with additional training in the area of drug abuse, testified that he was employed by Philip Morris from 1981-1984. Philip Morris employed him to work in its secret laboratory where rat studies were conducted in an attempt to identify a nicotine substitute that would eliminate the adverse cardiovascular effects, but still keep people smoking.

A nicotine substitute would have to bind in the same area of the brain and produce the same effects on brain tissue, but Mele and his coworkers were told never to use the words, "drug" or "addiction."¹² Thus, they euphemistically concluded that rats "will work for" nicotine in the same way that they will work for cocaine or heroin. But the question of addiction or dependence was never in doubt, and their research goal was not to prove or disprove addiction, but to find com-

¹² The term *cancer* was not to be used either; they referred to it as "biological activity."

pounds that would substitute for nicotine, in case nicotine were ever banned.

Dr. Mele wanted to publish a paper on nicotine tolerance during the time he worked for Philip Morris from 1981 to 1984, but his superiors would not permit it. He was told the research demonstrated that nicotine was a "dependence producing substance" within the definition of the Diagnostic and Statistical manual of the American Psychiatric Association, and that it would not be acceptable to the company to have this known by the public. During this period, he heard a Philip Morris officer, Jim Remington, say, "We all know it is addicting, it's addicting as hell. And our real concern is stopping these anti-smoking people outside the gates."

Thus, Philip Morris knew in the late 1950s, when Richard Boeken started smoking, that cigarettes caused lung cancer. Further, it is reasonable to infer that it also knew by that time, or at least well before 1969, that nicotine was addictive, and that the more nicotine its cigarettes could deliver, the more quickly a smoker would become addicted. By creating a false public controversy, Philip Morris's fraud was directed toward all addicted smokers, providing the doubt or parallel "truth" necessary to rationalize continued smoking.

The evidence also shows that Boeken was addicted to smoking, and Philip Morris's campaign of doubt had its desired effect. Boeken started smoking at the age of ten, occasionally sneaking butts from ashtrays. By the time he was 14 years old in 1957, Boeken was smoking two packs a day, and even more as he got older.

By the time he was 15 or 16, Boeken had begun to suffer his first bouts of bronchitis. The doctor gave him antibiotics, but did not tell him to quit smoking. Although his high-school swim coach told him not to smoke, because it would affect his "wind," meaning endurance, no other teacher told him not to smoke. Most of the teachers smoked, as well. Boeken's mother allowed him to smoke openly at home. She

smoked two packs a day herself, and never told him of the dangers of smoking.

Boeken suffered more bouts of bronchitis in his twenties, and by his thirties, he suffered two or three each winter. They were always treated with antibiotics, and no doctor ever told Boeken that they were caused by smoking. Many doctors also smoked at that time. Boeken began to suspect in the mid-seventies that smoking bore some relationship to his bronchitis, but he was unable to stop or even cut down on the number of cigarettes he smoked while he was ill, even when it hurt to inhale.

The Surgeon General warnings went on cigarette packs in the mid-to-late 1960s. Boeken thought that the warnings were "political more than anything else," and that they were required by the government pursuant to some personal vendetta of the Surgeon General. He did not even read the Surgeon General's warning until after he filed this action. Boeken explained, "I believed the cigarette advertisements.... I didn't think there was anything wrong.... I believed they were good for you. I believed everybody smoked them. You're back in the 60's, right? ... I didn't believe they were unhealthy."

But Boeken was aware of what he described as a "controversy." He testified that in the 1960s, he heard that the cigarette companies had refuted the fact that cigarettes were addictive, dangerous, harmful, or cancer-causing, and he was aware of a "conflict" over the Surgeon General's warnings. And he relied upon the refutations by the tobacco industry. It was only much later that Boeken discovered there was no "real" controversy. He testified that if Philip Morris had made the real risk of lung cancer and death clear to him in the 1960s, when Philip Morris was instead creating a false controversy with regard to the Surgeon General's report, he would have quit smoking.

In the 1970s, Boeken heard through various news media that tobacco companies claimed that there was no proof or scientific fact that smoking caused cancer, emphysema, or any other lung or blood disease. He trusted them, and believed the harm was being overstated by others. Other than advertisements, however, he could not recall particular statements made by tobacco companies until much later, when tobacco executives falsely testified before Congress in 1994.

By the 1970s, he knew that cigarettes were addictive, and that he was addicted, but he believed the statements by the industry that there was no health risk. The first time that Boeken knew that smoking could cause a catastrophic illness was around 1976, when he had his gallbladder removed, and the doctor told him he could get emphysema. He consulted another doctor, who said, "Forget it. You don't have emphysema. He was playing with you."

Boeken tried to stop smoking several times over the years. The first time was in 1967, when his girlfriend gave him an ultimatum. He did not want to lose her, so he stopped; but three or four weeks later, he started again, and she left him.

Boeken tried to quit again in 1976, at the beginning of what he termed, "the health craze," when jogging became popular. He wanted to jog too, and he started lifting weights, but he felt he needed stronger "wind." He was unable to stop smoking, however, due to withdrawal and cravings. His withdrawal symptoms consisted of a bad attitude, nastiness, anger, and a huge appetite. He became edgy and snappy, with inappropriate angry reactions.

In 1980, Boeken tried hypnosis to quit. He succeeded for 30 or 40 days, the longest time ever, but he was a "nervous wreck." His first relapse, a cigarette smoked with a cup of coffee, felt like "the best thing that ever happened" to him.

In 1982, Boeken attended a Smoke Enders course for three or four weeks, attending three or four times a week. And in 1986 or 1987, he joined Smokers Anonymous, a 12-step program. He was motivated to quit by more frequent bouts of bronchitis, as well as a continuing desire to run, but he claimed that he still did not know that smoking caused lung cancer. Boeken tried Nicorette gum on more than one occasion, and patches, sometimes both at the same time, but he failed to quit.

After a three-month heroin addiction in the late 1960s, Boeken entered a methadone maintenance program, and quit methadone within three years. In the mid-seventies, Boeken went to Alcoholics Anonymous and stopped drinking in nine months. But he has never been successful at quitting smoking.

In 1981 or 1982, thinking it would lessen his bronchitis, Boeken switched to Marlboro "Lights," because they were lower in tar and nicotine, and "milder." As soon as Philip Morris began to market Marlboro "Ultralights," he switched to those.

In 1994, Boeken's mother, who smoked two packs a day until her death, died of lung cancer, and he had no more doubts about whether smoking caused cancer. On the news later the same year, Boeken saw portions of the testimony of tobacco company executives before Congress. They all denied that tobacco was addictive or harmful. They all denied under oath that it caused cancer. He knew they were lying about the cancer, but it was much later that he learned for the first time that accelerants, additives, or chemicals were added to the tobacco in his cigarettes, in order to increase their addictiveness.

Even then, Boeken was still unable to quit. In October 1999, he was diagnosed with lung cancer and underwent extremely painful surgery to remove the upper part of a lung, and then he began chemotherapy. By that time, however, the

cancer had spread to his lymph nodes, and his chance of surviving the disease was less than one percent. Within a year, the cancer had spread to his brain, and there was no chance of survival.

Boeken stopped smoking just before the surgery to remove part of his lung, but started taking an occasional puff or two after the first round of chemotherapy was over, because it calmed him. But he was shattered when he was diagnosed with brain cancer, and felt he needed more, so he bought a pack of Marlboro Reds, and was soon smoking two or three packs a day.

Boeken testified that if Philip Morris had made it clear to him in the 1960s, the 1970s, or even the 1980s, that cigarettes cause lung cancer and death, he would not have smoked. At least, he thought he would have made an "honest effort" to quit. He also felt that if Philip Morris had admitted in the 1960s or 1970s, not only that smoking caused lung cancer, but also that Philip Morris added ingredients to Marlboro cigarettes in order to increase their addictiveness, he would have stopped smoking Marlboros.

Even before Boeken became a target member of a group of addicted smokers, Philip Morris targeted Boeken as a member of another group -- adolescent boys. Until 1955, Marlboro was marketed primarily to women smokers. At that time, Philip Morris began to reposition the brand as masculine. From the mid-to-late 1950s, its ads featured a handsome, virile, tough and independent-looking young man with a tattoo, looking as though he could be a dashing movie star, a detective, a sailor, or a cowboy -- the "Marlboro Man."

Marvin Goldberg, Ph.D., Boeken's marketing, advertising, and consumer behavior expert, explained how such advertising exerts a particularly powerful influence upon adolescent boys. He concluded from a review of Philip Morris's advertisements that they were intended to target young males from 10 to 18 years old, beginning in 1955. And, in

Goldberg's opinion, the ads were aimed at young male "starters," first-time smokers.

Goldberg testified that child development literature suggests that young adolescents are just developing their self-concept, and that they are very self-conscious. They feel that others are equally conscious of them, and want to appear to be mature, strong, independent, and masculine. If they see that a self-confident, virile, and handsome man is smoking a certain brand of cigarette, they are likely to conclude that if they smoke that brand, they will look less fragile and vulnerable than they really are. And when their peers do the same, the cigarette brand acts as a badge and a magnet.

Philip Morris advertised on popular family television shows in the 1950s and 1960s, such as "I Love Lucy," the most popular show in 1955. Other popular prime-time shows on which it advertised were "Red Skelton" and "Jackie Gleason," both comedy shows, "Rawhide," a western, "Perry Mason," a detective show, "Route 66," an adventure drama, and "Alfred Hitchcock" and "East Side West Side," suspense and mystery shows. "Rawhide" and "Route 66" involved characters similar to the masculine images in the ads of that period.

Television advertising has been shown to be very effective, particularly with children. And more than 30 percent of the audience for such shows as "Red Skelton" and "Jackie Gleason" consisted of children, well above the percentage of children in the population.

With this evidence in mind, we return to Philip Morris's contention that Boeken's fraud claim failed because he could not recall a *particular* advertisement that made him decide to smoke.

Goldberg testified that Boeken's inability to recall being influenced by any particular advertisement does not mean that it was not a cause of his smoking. Goldberg described the various media for advertising, and explained that the av-

average person receives about 1000 advertising messages per day, too many for most people to process; so most are perceived in glimpses, making repetition an important feature in advertising. Thus, even if advertising images remain in the background, and are perceived only in glimpses, repetition causes them to become familiar, creating associations in the minds of people who do not think them through. This results in "associative learning," and those influenced by it are unlikely to be aware of it.

Associative learning is particularly effective with children. The Surgeon General's reports of 1994 and 1996 concluded that advertising encourages youth smoking. Studies have shown that the more children are exposed to cigarette advertising, the more they overestimate the number of smokers, and are persuaded that smoking is the norm. Such a belief among children is one of the highest risk factors for youthful smoking. They smoke because "it's the thing to do."

And, as the Supreme Court recognized in *Mirkin*, as well as prior to *Mirkin*, "[c]hildren in particular are unlikely to recall the specific advertisements which led them to desire a product...." [Citation.] (*Mirkin, supra*, 5 Cal.4th at p. 1099, quoting *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 219.) Boeken's testimony bears this out. Boeken started smoking at the age of ten, occasionally sneaking butts from ashtrays. At the age of 12, he made play cigarettes from gum sticks, rolling them lengthwise. When he was thirteen years old, he began to smoke whole, real cigarettes. He did it because "everybody smoked. All adults smoked. It was fashionable. It was sophisticated. It was cool. It was adult.... Sports figures smoked. Race car drivers smoked. Everybody smoked.... All the kids smoked." Boeken wanted to be grown up. He was at "that age," and "that was the thing to do."

He wanted to smoke even though it was not pleasurable at first -- it caused him to feel dizzy, faint, and to cough, and

he had to "train" himself to inhale. At first, he smoked whatever brand he could get his hands on, and then he discovered vending machines, which allowed him to pick the brand he wanted. He used the vending machines in the coffee shops across from his junior high and high schools, where a pack of cigarettes cost only 25 cents and no one interfered.

With the discovery of vending machines, Boeken was able to buy a particular brand, and he chose Marlboros, because "[t]hey were everywhere. They advertised everywhere." It was the cigarette of choice in his social set, his culture, and all his friends smoked Marlboros. Marlboro ads seemed to be everywhere--at baseball games, sporting events, racing events, and on racing cars. Boeken testified, "I was visually inundated with this brand of cigarette." And he was "impressed by the ads," although he could not recall anything about any particular ads between 1957 and 1960. And no particular advertisement came to mind as a factor in his decision to smoke.

To Boeken, Marlboros represented a very macho, sophisticated, hip way of smoking. He perceived a message that it was the one and only cigarette to smoke. Boeken remembered the 1950s and 1960s as the age of Playboy Magazine, sophistication, machismo, and doing manly things, like smoking cigarettes.

In that era, Boeken thought of himself as a "real guy." At the time of his testimony, Boeken picked out several advertisements from the 1960s that looked familiar to him. He remembered the "Marlboro Country" ads, and the slogan, "Come to where the flavor is." Boeken also remembered billboards showing the "Marlboro man" with his lasso, and another with a healthy looking model in great shape jumping over a fence with one hand. Boeken thought that the healthy and robust images in the cowboy ads implied that Marlboros were good for you.

He thought the Marlboro man was a “man’s man,” like his hero, John Wayne. Boeken rode a motorcycle -- his equivalent of John Wayne’s horse, and in 1966, at the age 21, he rode around Europe on his motorcycle.

Over the years, another brand’s ad campaign occasionally caught Boeken’s attention, and he tried it for a few days, but always returned to Marlboros, although he was not sure exactly why. He knew he liked the taste better than other cigarettes--they were smoother, yet stronger.

Thus, Boeken started smoking Marlboros as a child for reasons that track Philip Morris’s advertising of the time, and he remembered their themes with fair certainty, as well as how they enticed him to smoke with false images of health, sophistication, and machismo.

“Substantial evidence means such evidence as a reasonable fact trier might accept as adequate to support a conclusion; evidence which has ponderable legal significance, which is reasonable in nature, credible and of solid value. [Citations.]” (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 142.) We conclude that the evidence of Boeken’s actual reliance on Philip Morris’s fraud meets this test.

3. *Substantial Evidence Supports a Justifiable Reliance Finding*

Philip Morris contends that Boeken’s reliance upon its fraud was unreasonable and therefore, it suggests, unjustifiable as a matter of law. In support of this contention, Philip Morris relies in part upon Ohio law, as interpreted by a federal trial court in an unpublished memorandum opinion, *Glassner v. R.J. Reynolds Tobacco Co.* (N. D. Ohio Jun. 29, 1999) 1999 WL 33591006. Philip Morris claims that the federal court of appeals in *Glassner v. R.J. Reynolds Tobacco Co.* (6th Cir. 2000) 223 F.3d 343 affirmed the trial court’s

ruling that as a matter of law, evidence of common knowledge of the dangers of smoking *requires* a finding that reliance on the tobacco companies' fraud is unjustifiable. Philip Morris misreads the appellate opinion. While the court of appeals affirmed the judgment, it expressly disagreed with the district court's ruling on justifiable reliance. (See *id.* at p. 353.)

Philip Morris also relies upon Massachusetts law, as interpreted by a federal trial court. (*E.g., Massachusetts Lab. Health & Wel. v. Philip Morris* (D.Mass. 1999) 62 F.Supp.2d 236, 244.) That court held that the facts alleged in the complaint filed by a union trust fund did not amount to justifiable reliance as a matter of law, but applied the same objective standard of reasonableness to both intentional misrepresentations and negligent misrepresentations. (See *id.* at p. 244.)

Under California law, which controls in this case, whether reliance was reasonable is a question of *fact* for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) Further, under California law, whether reliance is reasonable in an intentional fraud case is not tested against the "standard of precaution or of minimum knowledge of a hypothetical, reasonable man." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415.)

"Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. [Citations.] 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' [Citation.] If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. [Citations.] 'He may not put faith in representations which are postposterous, or which are shown by facts within

his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth....' [Citation.]" (*Seeger v. Odell, supra*, 18 Cal.2d at p. 415.)

Thus, whether Boeken's reliance upon Philip Morris's fraud was justifiable requires a factual inquiry. Nevertheless Philip Morris has failed to summarize the facts essential to such an inquiry.

As we have discussed, it is presumed that the evidence is sufficient to support the jury's factual findings, and it is the appellant's burden to demonstrate that it does not. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) And in furtherance of that burden, the appellant must fairly summarize the facts in the light favorable to the judgment. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) Philip Morris's failure to do so has resulted in a forfeiture of this contention, as well. (See *ibid.*)

Beyond that, substantial evidence supports a finding that Boeken's reliance was justifiable. Boeken testified that his belief in the tobacco companies, rather than the Surgeon General, was wishful thinking or naïveté. But he had believed in the honesty of "big business." Further, Philip Morris had studied and understood nicotine addiction, and from the facts we have previously summarized, it is reasonable to infer that it knew and intended that addicted smokers would use its misrepresentations and misleading statements to engage in denial and rationalization; and moreover, that smokers' ignorance of the increased addictiveness of Philip Morris's Marlboro brand would keep them smoking Marlboros and ensure their reliance upon such denial and rationalization.

4. *Product Liability*

We note, and Boeken points out in his brief, that Philip Morris has made no contention or argument in its opening

brief with regard to the sufficiency of the evidence supporting the jury's verdict of product liability. The only contention made by Philip Morris in its opening brief with regard to the sufficiency of the evidence to support the product-liability claim was, in reality, a claim of instructional error, which we shall discuss in the next section.

Philip Morris raises a substantial evidence contention with regard to product liability for the first time in its reply brief. An assignment of error must be made in the opening brief, or it may be deemed waived. (See *Hibernia Sav. and Loan Soc. v. Farnham* (1908) 153 Cal. 578, 584) Philip Morris would have us find that it did, in fact, raise the issue in its opening brief, reasoning that by addressing the sufficiency of the evidence to support a finding of fraudulent concealment, it necessarily addressed a failure to warn of the dangers of its product.¹³ Philip Morris offers no authority or reasoned argument, however, for the suggestion that a failure to prove

¹³ Since we have found that substantial evidence supports the fraud verdict, even if there were insufficient evidence to support a claim for product liability the judgment would not have to be reversed. Although denominated, "special verdict," the verdict in this case was a general one, since it contained no findings of fact, and did not leave the judgment to the court. (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347, fn. 7; Code Civ. Proc., §§ 624, 625.) "[W]here several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error. [Citations.] When a situation of this character is presented it is a matter of no importance that the evidence may have been insufficient to sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues." [Citation.] (*Mouchette v. Board of Education* (1990) 217 Cal.App.3d 303, 315, disapproved on another ground in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 984, fn. 6; see also, *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673.)

the elements of fraudulent concealment is necessarily fatal to a cause of action for product liability; and for this additional reason, we need not reach it. (See *Estate of Randall* (1924) 194 Cal. 725, 728-729.)

Notwithstanding the failure of Philip Morris to raise the issue in the opening brief, we have reviewed the record and we find sufficient evidence to support a product liability judgment.

The consumer expectations test is satisfied when the evidence shows that "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429.) Some degree of misuse and abuse of the product is foreseeable. (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833.)

Dr. Benowitz testified that Marlboro "Lights" and "Ultralights" are not light at all, since they deliver more than 0.1 milligram nicotine and more than 1 milligram tar per cigarette to human smokers who *compensate*. Compensation occurs when the smoker adjusts the way he or she smokes in order to get a satisfying amount of nicotine, by covering the holes in the filter, sucking harder, drawing the smoke further into the lungs, and keeping it in longer.

Benowitz testified that studies have shown that most smokers believe that light cigarettes are safer than regular cigarettes, and the majority of smokers do not know that they compensate. Compensation by smokers draws carcinogens further into the lungs, which is more likely to cause adenocarcinoma of the lung, a more aggressive form of cancer than those more prevalent among smokers of regular strength cigarettes.

Philip Morris suggests that the consumer expectations test is, in essence, one for failure to warn, and therefore preempted by the Public Health Cigarette Smoking Act of

1969.¹⁴ Again, we disagree. Product liability under a failure-to-warn theory is a distinct cause of action from one under the consumer expectation test. (*Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 717.)¹⁵

We turn to Philip Morris's claims of instructional error.

5. Civil Code section 1714.45

Philip Morris contends that Boeken was not entitled to a finding of product liability, whether measured under the "risk-benefit" test or the "consumer expectations" test, and that the trial court erred in instructing with BAJI No. 9.00.5 instead of 9.00.6.¹⁶

We note that Philip Morris's request for BAJI No. 9.00.6 was made in a motion *in limine* relating to Civil Code section 1714.45, and it was apparently withdrawn, as we discuss within, with no indication in the record that the request was renewed later. "In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion." [Ci-

¹⁴ See a more detailed discussion of the 1969 Act, within.

¹⁵ Since smokers do not know they compensate, a warning may not make the product any safer. Philip Morris's own expert, Dr. Richard Carchmann, admitted that the only way to reduce the risk is to quit smoking.

¹⁶ BAJI No. 9.00.6 reads: "The (manufacturer or seller) of a product is not liable for [injuries] [death] caused by a defect in its design, which existed when the product left the possession of the (manufacturer or seller), if: [¶] 1. The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer, who has the ordinary knowledge common to the community, and who consumes the product; and [¶] 2. The product is a common consumer product intended for personal consumption."

tations.]” [Citation.]” (*Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 701.) Nor is the trial court required to give an instruction that a party has withdrawn. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).)

Philip Morris contends that Boeken failed to prove the elements of product liability, because “[a] defendant ... may not be held liable for selling a legal product merely because that product is inherently dangerous.” Philip Morris cites BAJI No. 9.00.6 as the only authority for this contention. BAJI No. 9.00.6 is derived from the former version of Civil Code section 1714.45, which provided cigarette manufacturers with immunity from product liability actions.¹⁷ (Stats.1987, ch. 1498, § 3, p. 5778; see *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal. 4th 828, 837 (*Myers*).) Before we discuss the instructional issues, we must first address the history of the immunity statute.

The statute was originally passed in 1987 and, as pertinent, provided: “In a product liability action, a manufacturer or seller shall not be liable if: [¶] (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and [¶] (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, *tobacco*, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts.” (*Italics added.*)

Thus, as originally enacted in 1987, the statute’s enumerated examples of common consumer products included tobacco. (See Stats. 1987, ch. 1498, § 3, p. 5778; *Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 860-862 (*Naegele*).) It was based upon the position taken in Comment i of Section 402A of the Restatement (Second) of Torts, that

¹⁷ We shall hereinafter refer to the statute as section 1714.45 or “the immunity statute.”

“a manufacturer or seller *breaches no legal duty* to voluntary consumers by merely supplying, in an unadulterated form, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers.’ [Citation.]” (*Naegele, supra*, 28 Cal.4th at p. 864, italics in the original, underlining ours.)

In 1997, the Legislature amended section 1714.45 to rescind the statutory immunity for tobacco companies as of January 1, 1998. (Stats. 1997, ch. 570, § 1; see *Myers, supra*, 28 Cal.4th at pp. 832-833, 837.) Thus, “while the Immunity Statute was in effect -- from January 1, 1988, through December 31, 1997 -- no tortious liability attached to a tobacco company’s production and distribution of pure *and unadulterated* tobacco products to smokers. [Citations.]” (*Myers, supra*, at p. 840, italics added.)

The statute was expressly retroactive, and while it was in effect it immunized tobacco manufacturers from liability for conduct before, as well as during the ten-year period. (*Myers, supra*, 28 Cal.4th at p. 847; *Souders v. Philip Morris Inc.* (2002) 104 Cal.App.4th 15, 24, fn. 7.) Once it was repealed, however, the statute’s retroactive effect was nullified, and tobacco companies were no longer immune to liability for conduct occurring prior to 1988.¹⁸ (*Myers, supra*, 28 Cal.4th at p. 847.) Therefore, at the time of trial in 2001, BAJI No. 9.00.6 no longer applied to cigarettes. (See Comment to BAJI No. 9.00.6 (Jan. ed. 2004); Stats. 1997, ch. 570 (S.B. 67), § 1.)

¹⁸ In *Myers*, the Ninth Circuit Court of Appeals had certified the following question to the California Supreme Court: “‘Do the amendments to Cal. Civ. Code § 1714.45 that became effective on January 1, 1998, apply to a claim that accrued after January 1, 1998, but which is based on conduct that occurred prior to January 1, 1998?’” (*Myers, supra*, 28 Cal.4th at p. 839.)

Neither *Myers* nor *Naegele* had been decided when Philip Morris filed its opening brief. Consistent with the law before those cases were decided, in its opening brief, Philip Morris argued that repeal of the original section 1714.45 did not nullify its retroactivity, and that it retained immunity from liability that would otherwise have arisen not only prior to 1998, but also prior to the statute's passage in 1987. Before Philip Morris filed its reply brief, *Naegele* and *Myers* were published. *Myers* held that the immunity statute applied to tobacco only during the ten years beginning January 1, 1988 and ending December 31, 1997. (*Myers, supra*, 28 Cal.4th at p. 837.) *Naegele* confirmed this and also held that the protection of the ten-year immunity statute did not "extend to allegations that tobacco companies, in the manufacture of cigarettes, used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking." (*Naegele, supra*, 28 Cal.4th at p. 861.)

Although Philip Morris addressed *Naegele* and *Myers* in its reply brief, we permitted it to file a supplemental opening brief. For the first time in its supplemental brief, Philip Morris claims that it requested and submitted a jury instruction that would have limited its liability for any wrongs committed during the ten-year immunity period, proposed instruction O.

Philip Morris's packet of proposed jury instructions, filed on May 16, 2001, included that proposed instruction, which reads:

"You may not find defendant liable on plaintiff's claims of design defect, negligence, fraud and conspiracy or failure to warn based on anything that defendant did or did not do between January 1, 1988, and December 31, 1997. It was the policy of California during that period to recognize cigarettes as inherently unsafe products that could nevertheless be lawfully sold because they carried adequate

warnings regarding their dangers, and to encourage the continued availability of cigarettes and other tobacco products to those adult consumers who wished to use them. This was accomplished by a law that protected producers or suppliers of cigarettes or other tobacco products from legal responsibility for harms suffered by those who voluntarily consumed such products. That law was repealed as of January 1, 1998, and has no legal effect with respect to conduct since that date, and also has no legal effect with respect to plaintiff's claim for breach of express warranty."

The problem we have is that we have found no ruling by the trial court rejecting this instruction. The instruction conference was unreported. We did find a cover sheet signed by the trial judge, and file-stamped June 6, 2001, which is entitled, "Instructions -- Refused Withdrawn, Consisting of 10 pages herein." But the ten pages are not attached, unless the cover sheet was meant to refer to the ten pages attached to the document immediately following it in the Clerk's Transcript.

The document immediately following the trial court's cover sheet is entitled, "Objections of Defendant Philip Morris Incorporated to Court's Rejection of Certain Jury Instructions Proposed by Defendant." The ten pages that follow contain seven proposed instructions. Proposed Instruction O is not among them.

We requested Philip Morris to provide us with the exact page numbers in the appellate record where the trial court's refusal to give its proposed Instruction O might be found, or to augment the record with a copy of the trial court's minute order or additional reporter's transcript, if any, showing the refusal, or to inform this court if there was no such order or ruling.

Rather than directly respond to our request, Philip Morris filed a letter brief suggesting that we must assume that the instructions were proposed and rejected, *because the record is silent* with regard to an express ruling, and the instruction conference was in chambers. As authority for its suggestion, Philip Morris states that it knows of no authority to the contrary.

In fact, there is no shortage of authority to the contrary. It is well established that error cannot be presumed, and it is the appellant's burden to provide a record sufficient to show the asserted error. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.)

Philip Morris also filed a motion to augment the record, but not with an agreed or settled statement reflecting the in camera instruction conference or any ruling on the instructions. (See *Maria P. v. Riles*, *supra*, 43 Cal.3d at p. 1295; *In re Kathy P.* (1979) 25 Cal.3d 91, 102; Cal. Rules of Court, rules 6, 7, 12(a).) Instead, Philip Morris seeks to augment the record with the trial court's statement of decision regarding Philip Morris's pretrial motion for summary adjudication, in an attempt to show that requesting an instruction or a ruling on the supposedly proposed instruction would have been futile, because the trial court had already ruled against it on that issue.

We grant the motion, because the statement of decision was part of the trial court record, but find it ineffective for Philip Morris's purpose. Philip Morris did not raise the issue of partial retroactivity or a ten-year immunity period in its motion for summary adjudication, and the statement of decision addressed only Philip Morris's claim of immunity for all pre-1998 conduct, not just conduct from 1988 to 1998.

The judgment is presumed correct, and error is never presumed. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) A claim of error by a party who fails to provide the record necessary to determine upon what basis the trial court

made its order must be resolved against that party. (*Maria P. v. Riles, supra*, 43 Cal.3d at p. 1295.) And we must presume that the basis upon which the trial court made its order was a proper one. (*Rossiter v. Benoit, supra*, 88 Cal.App.3d at p. 712.)

We presume, therefore, that Philip Morris abandoned, either expressly or implicitly, its request for Proposed Instruction No. O. This presumption is consistent with the legal position asserted by Philip Morris at trial and through its opening brief on appeal: that the statute immunized it from liability for all conduct prior to January 1, 1998, including all conduct preceding January 1, 1988, not just for the ten year period the statute was in force. A party is not entitled to instructions with regard to a theory or defense that the party has *not advanced*. (See *Soule v. General Motors Corp., supra*, 8 Cal.4th at p. 572.)

We also note that instruction O was incomplete because it did not incorporate the term "unadulterated" within its language. Philip Morris argues that the omission was so minor as to require the trial court to modify the instruction. We disagree. "A trial court has no duty to modify or edit an instruction offered by either side in a civil case. If the instruction is incomplete or erroneous the trial judge may, as he did here, properly refuse it. [Citations.]" (*Truman v. Thomas* (1980) 27 Cal.3d 285, 301.)

Philip Morris states in its reply brief that "there is no evidence that Philip Morris, during the 1960s or at any other time, was adding things to Marlboro cigarettes ... for the purpose of addicting plaintiff or any other smoker." In fact, there is more than ample evidence in the record that Philip Morris incorporated additives that not only increased the risk of harm from nicotine, but also created harmful effects not inherent in smoking unadulterated tobacco, thereby eliminating any immunity Philip Morris might otherwise have enjoyed

from 1988 to 1998. (See *Naegele, supra*, 28 Cal.4th at pp. 864-865; *Myers, supra*, 28 Cal.4th at p. 837.)

Philip Morris's own expert, Dr. Carchmann, who had been employed by Philip Morris for ten years, admitted that Philip Morris adds compounds, such as urea, that release ammonia in the tobacco, and flavorings, such as chocolate and licorice, although he claimed that it was done only to enhance flavor and sensation to smoking, and he denied that it had any adverse effect.

Benowitz testified that ammonia raises the alkaline level, or PH, of tobacco, and the higher the PH, the more free-base nicotine is delivered to the smoker. Contrary to Philip Morris's contention that there was no evidence showing that ammonia causes any negative health effect beyond those inherent in tobacco, or that it makes tobacco more addictive, Philip Morris's former director of applied research in its research and development department, Dr. Farone, testified that although nicotine does not cause cancer, it does have harmful effects on the nervous system. Dr. Mele testified that nicotine has adverse cardiovascular effects, raising the heart rate and blood pressure.

Farone testified that urea, which turns to ammonia, was added by Philip Morris to its cigarettes in order to create *more* nicotine. A thorough explanation of the ill effects of nicotine was provided by Benowitz, whose research over the past 25 years has been into the effects of nicotine, nicotine addiction, smoking behavior, and smoking-related illnesses. Nicotine is similar to the hormone ACH, which is responsible for nerve communication, and is highly concentrated in the brain.¹⁹ ACH binds to receptors, proteins, which results in the release of other hormones that affect mood and behavior.

¹⁹ See footnote 4, *ante*.

One of the hormones released when a receptor is activated is dopamine, which causes pleasure. Other hormones stimulate and help concentration; still others act like an anti-depressant; while others control the appetite. Nicotine attaches to the same receptors, but in larger amounts, and activates them to a greater extent. Smoking controls mood and behavior in this way, and since smoking delivers nicotine directly from the lungs to the heart and brain, it achieves its effect in seconds. Since immediate reinforcement encourages addiction, smoking is the delivery system that causes the fastest addiction. The smoker's brain is never the same as a never-smoker, even after he manages to quit.

The *more nicotine delivered* to the brain, the more the receptors are stimulated, increasing the smoker's tolerance as the brain tries to normalize. Eventually, the structure of the brain changes, and smokers develop more and more nicotine receptors. Farone testified that adding urea causes *more* nicotine to be delivered by the gas produced by smoking each cigarette, thus increasing Marlboro's effectiveness and speed in causing addiction.

Philip Morris claims that Benowitz testified that there was no evidence that ammonia causes any negative health effects, but its argument is not only incorrect, it is also very misleading. Philip Morris refers to Benowitz's testimony in which he merely said that he had not *reviewed* any published research relating to Farone's nicotine displacement theory. Philip Morris ignores Farone's testimony that adding urea increases ammonia, which in turn "pushes" more nicotine into the smoke.

The evidence also established, contrary to Philip Morris's assertions, that additives contributed to Boeken's lung cancer. By the age of 14, Boeken smoked every day, at least two packs a day, and continued for 40 years, unable to quit for more than a brief period even after he was diagnosed with lung cancer. According to Benowitz, Boeken was not just

addicted to cigarettes, he was highly addicted. The increased ammonia had done its job of addicting more effectively and more quickly.

Further, Farone testified that 20 percent of the contents of a cigarette consists of added flavorings. Flavorings such as chocolate and licorice are not added simply to improve the taste, but also to make it easier to inhale the smoke by creating bronchodilators, which open up the lungs. Cigarettes that are easier to smoke allow carcinogens to reach deeper into the lungs, which can lead to adenocarcinoma, the very aggressive and fast-spreading cancer from which Boeken suffered.

Epidemiologist and oncologist, Gary Strauss, explained that when cigarettes are more irritating, people do not inhale deeply, and the central part of the lungs is the area primarily exposed to cancer-causing particulates. The more deadly adenocarcinomas, however, grow in the periphery, that is, the end of the lung, reached by deeper inhaling. The incidence of these cancers has increased in recent years and that increase is attributable to low-tar cigarettes.

Even if Philip Morris did not withdraw Proposed Instruction O, and the court refused to give the instruction, the court did not err.

6. *Federal Preemption Contentions*

Philip Morris contends that certain evidence, argument, and claims were preempted by the Public Health Cigarette Smoking Act of 1969, and that the trial court failed to instruct the jury properly "on this point." Its contentions are twofold: (1) the trial court erred by refusing to "instruct the jury, as Philip Morris requested, that it could not hold Philip Morris liable on the ground that its post-1969 advertising contained supposedly 'glamorous' and 'healthy' imagery"; and (2) that the trial court erroneously "admitted, over Philip

Morris's objection, evidence that Philip Morris's advertising contained such imagery."

The 1969 Act requires a particular warning, or a variation of it, to appear in a conspicuous place on every package of cigarettes sold in the United States. (15 U.S.C. § 1333; see generally, *Cipollone v. Liggett Group, Inc.*, *supra*, 505 U.S. at pp. 515-518, 525 (*Cipollone*)). It also explicitly reserves authority to The Federal Trade Commission to identify and punish deceptive advertising practices relating to smoking and health. (*Cipollone*, *supra*, at p. 529; 15 U.S.C. § 1336.) The United States Supreme Court has construed the 1969 Act as preempting damage claims based upon a failure-to-warn theory that requires a showing that post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, or that its advertising tended to minimize or neutralize the health hazards associated with smoking. (*Cipollone v. Liggett Group, Inc.*, *supra*, 505 U.S. at pp. 524, 527-528.)

Philip Morris claims that it requested two instructions relating to federally preempted advertising, and that the trial court refused both requests. The first of the two instructions at issue was requested *orally* during the testimony of Boeken's expert on nicotine addition, Benowitz. Philip Morris has summarized neither the testimony nor its discussion with the court, has not put its request for this instruction in context, and has not summarized the court's ruling, which was not simply a refusal to give a requested instruction, as we shall explain. We begin with a summary of the relevant portions of the record.

Philip Morris objected during Benowitz's testimony regarding the use of healthy, sexy, happy models in advertisements, and moved for a mistrial. The court disagreed with that characterization of the testimony, and denied the mistrial, but offered to instruct the jury to disregard whatever it had heard from this particular witness with regard to adver-

tisements. Philip Morris's counsel, Mr. Leiter, replied, "We would ask that the court affirmatively instruct the jury that it may not find liability in this case based on any accusation or any evidence that healthy images in ads undercut the health warnings mandated by the Congress." The court refused to give this specifically requested language. But contrary to Philip Morris's suggestion that no instruction was given on the issue, the court did instruct as follows: "Ladies and gentlemen, just before we took the break, there was some testimony from this witness regarding certain advertising images and their potential effects. You'll recall that testimony. [¶] I instruct you at this time that with respect to that testimony, I want you to *disregard it for all purposes and do not use it for any purpose whatsoever* in this trial." (Italics added.)

Since Philip Morris has referred to nothing to the contrary, we presume the jury followed the court's instruction. (See *People v. Harris* (1994) 9 Cal.4th 407, 426.)

The second instruction that Philip Morris claims the court erroneously refused was its proposed instruction J. It reads as follows:

"Regardless of any of the other rules of law set forth in these instructions, you must follow the rules of federal law which I shall now give you.

"Because of federal law, you cannot hold defendant liable on the basis that after July 1, 1969, it should have included additional or more clearly-stated warnings in the advertising or promotion of [its] cigarettes because, as a matter of federal law, after July 1, 1969, defendant adequately warned plaintiff of the health risks of smoking, including 'addiction.'

"Also because of federal law, and except only as stated below, you cannot hold defendant liable on the basis that it:

“(a) through its advertising or promotional practices, neutralized, minimized, or undermined the effect of the federally mandated warnings appearing on every cigarette package after July 1, 1969, or

“(b) after July 1, 1969, failed to disclose, or concealed, or suppressed information about the health risks of smoking including ‘addiction.’

“The federal law does not limit the potential liability of defendant against claims that its product was defective in design in other respects, or that the defendant was negligent in other respects in the design of their product. The federal law also does not limit the potential liability of defendant against claims that it made affirmative misrepresentations about the health risks of smoking.”

As with Proposed Instruction No. O, we find no ruling by the trial court rejecting this instruction. Our request for a citation to the record for the trial court’s purported refusal of Instruction No. O also included a request for a citation to the court’s purported refusal of Philip Morris’s proposed Instruction No. J. Philip Morris has provided no such citation, and has not attempted to augment the record with an agreed or settled statement. (See *Maria P. v. Riles*, *supra*, 43 Cal.3d at p. 1295; *In re Kathy P.*, *supra*, 25 Cal.3d at p. 102; Cal. Rules of Court, rules 6, 7, 12(a).) But we did find Proposed Instruction J in the group of instructions under cover of the “Objections of Defendant Philip Morris Incorporated to Court’s Rejection of Certain Jury Instructions Proposed by Defendant.”

If the trial court did, in fact, refuse Instruction No. J, Philip Morris has failed to demonstrate error. A trial court is not required to give instructions in the precise language proposed, and it is not error to refuse instructions that are not reasonably brief, concise, and understandable to the average

juror. (*Dodge v. San Diego Electric Ry. Co.* (1949) 92 Cal.App.2d 759, 763-764.)

"Proposed instructions which are argumentative and misleading should not be given. [Citation.] Instructions should not draw the jury's attention to particular facts. It is error to give and proper to refuse an instruction that unduly overemphasizes issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.] ... Repetitious reference, in the instructions, that under the circumstances related the jury 'must find in favor ... of defendant' has been condemned. [Citation.]" (*Dodge v. San Diego Electric Ry. Co.*, *supra*, 92 Cal.App.2d at p. 764.) Instruction J suffered from all these infirmities, and the trial court had no duty to give it.

Philip Morris's second contention with regard to the 1969 Act is that the trial court erred in permitting Dr. Goldberg to testify at length and over its objection about preempted, post-1969 advertising. In that testimony, which took place on April 17, 2001, Goldberg referred to several exhibits which have not been made a part of the record on appeal. He described them as advertisements that demonstrate an intent to market Marlboro cigarettes to adolescent males, and to turn youthful nonsmokers into smokers.

A judgment may not be reversed unless the record shows that the appellant made a timely objection to or a motion to exclude or to strike the evidence and that the specific ground of the objection or motion was stated. (Evid. Code, § 353, subd. (a).)

Philip Morris contends that its objection was made in its motion in limine No. 1, which stated a general objection to any and all evidence that might relate to preempted advertising. Philip Morris's motion in limine did not, however, specify any particular evidence to be excluded, and did not

mention the Goldberg testimony about which it now complains.

A motion in limine to exclude evidence is not a sufficient objection unless it was directed to a particular, identifiable body of evidence and was made at a time when the trial court could determine the evidentiary question in its appropriate context. (*People v. Morris* (1991) 53 Cal.3d 152, 188-190, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Thus, Philip Morris's motion in limine did not preserve the issue for appeal.

Philip Morris also contends that the court gave it a "running objection ... to this whole area." The court allowed Philip Morris a "running objection" in a discussion which took place the day before the Goldberg testimony now in question, and although it does appear that the court may have been referring to evidence of preempted advertising, the discussion on that day was precipitated by Philip Morris's objection *on the ground of relevance* to testimony concerning the targeting of youthful smokers after Boeken became an adult. Philip Morris's counsel, Mr. Leiter, made it clear to the court that *he was not objecting to post-1969 youth-targeted advertising on the ground of federal preemption*.

On the day at issue, April 17, 2001, after Goldberg read an excerpt from an article about youth smoking, Leiter said, "Your Honor, may we have our standing objection," but he did not explain what standing objection he had in mind. The judge assented, apparently thinking that he understood to which objection counsel was referring, and he then took the matter up outside the jury's presence. The ensuing discussion began in relation to targeting youth smokers, and the court referred to a discussion of the subject the day before, April 16, 2001.

In the April 17 discussion, it was again the court that brought up the issue of preemption. Counsel for Boeken offered to stipulate to having the court strike the article from

which Goldberg had read. Leiter responded that he would prefer a limiting instruction, either at that time or later in the trial, regarding the proper use of the testimony and warning against the improper use of it under *Cipollone*. The court agreed to give such an instruction once it had "an appropriately written jury instruction" before it. Leiter agreed, with the understanding that he continue to have "a standing objection to all such testimony." The court replied, "You do, you do," and ruled that the "current information with the exception of erosion type suggestions" was relevant to an understanding of what occurred in the 1950s, when Boeken started smoking.

Thus, it appears that Philip Morris did not object to the Goldberg testimony regarding post-1969 advertisements, and whatever its vague "running" or "standing" objection was, it did not comply with Evidence Code section 353, subdivision (a). (*People v. Morris, supra*, 53 Cal.3d at pp. 188-190.)

The testimony to which Philip Morris did object concerned an excerpt from an article regarding the targeting of youth smokers, and Philip Morris refused an offer to stipulate to the court's striking that testimony, agreeing instead upon a limiting instruction to be submitted in writing. Even if Philip Morris could bootstrap its objection to the reading of the article into an objection to the testimony that preceded it, it may not complain on appeal about the admission of evidence that it induced the court not to strike. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

We conclude that Philip Morris has not preserved the issue for appeal. In any event, "[n]o judgment shall be set aside ... on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, ... unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) The burden is on Philip Morris, as appellant, to show

that error has resulted in a miscarriage of justice. (*Cucinella v. Weston Biscuit Co.*, *supra*, 42 Cal.2d at p. 83.) Further, Philip Morris "bears the duty of spelling out in [its] brief exactly how the error caused a miscarriage of justice." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

Philip Morris's prejudice argument is apparently based upon factors suggested by the California Supreme Court to determine whether an error of instructional omission was prejudicial -- "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule*, *supra*, 8 Cal.4th at pp. 580-581.)

But the only factor cited by Philip Morris that might have any merit, if the instruction had been erroneously refused, is its assertion with regard to the fourth factor -- an indication by the jury itself that it was misled. The closeness of the jury's verdict is such an indicator (See *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1070), and Philip Morris points out that there was a nine-to-three verdict with regard to failure to warn prior to July 1, 1969.

With regard to the first factor, however, although Philip Morris contends that Boeken "introduced a substantial amount of evidence ... of supposedly glamorous and healthy imagery in its post-1969 advertising," Philip Morris points only to the admission of the Goldberg testimony (to which Philip Morris did not object, as we have already discussed) regarding exhibits that have not been made a part of the record on appeal.

We must point out again that it is Philip Morris's burden to provide an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) When contentions are based upon exhibits that Philip Morris has not made a part of the record, it may be assumed that such contentions have been abandoned. (*Brown v. Copp* (1951) 105 Cal.App.2d 1, 8.)

Philip Morris has made no effort to discuss the second *Soule* factor -- the effect of other instructions. It does not summarize, discuss, or even mention the instructions that were given. Instead, it suggests that no instruction was given at all with regard to post-1969 advertising and promotion, with a misleading assertion that the "trial court issued no instruction that cured its failure to give Philip Morris's proposed instruction." In fact, the trial court instructed the jury regarding the 1969 limitations throughout its charge.

With regard to fraudulent concealment, the court instructed, "[F]ailure to disclose ... is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose ... prior to July 1, 1969." The special verdict form asked, "Prior to July 1, 1969, did defendant conceal or suppress a material fact?"

With regard to the product liability claim, the court instructed, "A product may be defective because of a defect in design or a failure to adequately warn the consumer prior to July 1, 1969"; and, "[A] product is defective if the manufacturer ... has a duty to warn of dangers and fails to provide an adequate warning of those dangers prior to July 1, 1969, a date established by law in this case"; and, "A cigarette manufacturer has a duty to warn prior to July 1, 1969 if [etc.]"; and, "For the period prior to July 1, 1969, one who supplied a product ... has a duty to use reasonable care to give warning."

Further, the special verdict form asked, "Was there either (1) a defect in design, or (2) a defect resulting from a failure to warn occurring before July 1, 1969?"

Thus, the jury was not permitted, as Philip Morris contends, to base liability upon a failure to warn after July 1, 1969, or upon advertising that minimized or neutralized the federally mandated warning after that date.

With regard to the fourth *Soule* factor, the effect of counsel's arguments, Philip Morris complains that opposing coun-

sel was permitted to argue that Philip Morris was the "devil" because of its allegedly glamorous advertising practices"; that Philip Morris "spent hundreds of millions and billions of dollars putting out advertising images to the exact contrary of the dangers of smoking"; that "Marlboro is on the side of Ferraris in Formula One Racing [and] guys, especially, who see themselves, adventurous or resourceful or strong go for that." Mr. Boeken did. He saw himself as that man."

If opposing counsel's argument tended to minimize or neutralize federally mandated warnings, it was incumbent upon Philip Morris to object and request that the jury be admonished. (See *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318.) Since it did not do so, it waived any contention based upon improper argument. (*Id.* at p. 318; *Horn v. Atchison T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610.)

We conclude that Philip Morris has failed to meet its burden to show that the trial court erred by refusing its instructions, as well as its burden to show that any such refusal amounted to a miscarriage of justice.

7. Impeachment with Felony Conviction

Philip Morris contends that the trial court abused its discretion in refusing to allow it to impeach Boeken with a 1992 felony wire fraud conviction.

Boeken brought a motion in limine to exclude any reference to his three criminal convictions, one in 1972 for receiving stolen property, one in 1976 for possession of heroin, and the 1992 wire fraud conviction. For the latter, Boeken had been convicted after pleading guilty pursuant to a plea bargain to one count of wire fraud as an aider and abettor. (See 18 U.S.C. §§ 1343, 2(a).) He admitted having sold a fraudulent investment in 1987 while employed as a securities salesman.

The motion in limine was granted *without* prejudice, after which the following exchange occurred:

"THE COURT: At this time, what I will do is I will grant the motion in limine in its entirety as to the felony convictions and they will not be admitted for any purpose, nor will counsel refer to it in any way, either directly or indirectly, through counsel or through any witnesses that may take the stand.

"It's without prejudice.

"If we get very far into any character issues--

"MR. LEITER: And by suggesting we defer it, I hadn't anticipated Your Honor was going to rule.

"THE COURT: I know you did.

"MR. LEITER: Obviously, credibility of the plaintiff is a key issue in the case. Income is a key issue in the case. And the conviction goes to both. And we would like to be heard on both of those issues, either now or at the appropriate time.

"THE COURT: All I can say to you is that I am certainly willing to listen. But based on the information that I have at the present time that's been presented to me in this motion in limine, I looked at it, I thought about it long and hard, balanced the 352 issues, it turns out from what I have seen so far, I am satisfied that I made -- that my instincts led me in the right direction and it was correct not to admit this evidence and that it would have been the very effects that 352 is designed to prevent occurring in a trial.

"But at the same time, I haven't seen everything, and there must be a certain amount of openness. But at the present time, this motion is granted."

Philip Morris did not raise the issue again until its motion for new trial. It now contends that the court abused its discretion in excluding the conviction, for three reasons: it was not too remote; fraud is probative on the issue of credibility; and Boeken's veracity was a "central issue."

The trial court's determination whether to admit or exclude a prior felony conviction for purposes of impeachment is made pursuant to Evidence Code section 352. (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274.) Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

An exercise of discretion under section 352 will be disturbed on appeal only if the trial court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124.)

We agree that a fraud conviction is probative with regard to credibility. But Philip Morris has not shown that its exclusion was arbitrary, capricious, or patently absurd, or that it resulted in a manifest miscarriage of justice. (See *People v. Rodriguez, supra*, 8 Cal.4th at p. 1124.) Notably absent from Philip Morris's argument is any contention that the probative value of the conviction might outweigh the obvious consumption of time that would have been taken up by the issue.

8. *Juror Misconduct*

Philip Morris contends that the trial court erred in removing a juror during deliberations.

The trial court's discretion to discharge a juror who refuses to deliberate is reviewed for abuse of discretion, and

will be upheld if there is any substantial evidence supporting the ruling, so long as the juror's refusal to deliberate appears in the record as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474-475.)

On the morning of May 23, 2001, one day into deliberations, the foreman sent out two notes to the judge stating, among other things: "We ... need instruction regarding Juror # 5 ... who is not participating in the discussion. She sits away from the table and reads her bible instead of contributing to the group conversation"; and, "Can we discuss the distraction regarding Juror # 5 She is not seating [sic] with us during the discussion. She instead chooses to read her bible and does not contribute to the group conversation."²⁰

In response to the note, the court reread to the jury the following excerpt from BAJI No. 15.52: "All jurors should participate in all deliberations."

Later, the foreperson sent out another note. "Per the court's instruction, Juror No. 5 is still not willing to sit around the discussion table and participate. She chooses to continue to read her bible, and it is upsetting the other jurors. This distraction is making it difficult for us to deliberate. I and a few other jurors have spoke [sic] with [Juror No. 5] about this."

The court then questioned Juror No. 5 separately in chambers. She denied that she had been reading her Bible during deliberations, although she kept it in front of her. She admitted that she did not sit "all the way up" at the table, but denied that she sat away from the table, failed to listen, or slept during deliberations.

Juror No. 5 explained to the court that questions had been raised in the jury room about her addiction to morphine, and

²⁰ The record is not clear on the timing and sequence of the various notes.

she found that avoiding eye contact helped her to avoid painful memories. She did this for "[her] own sanity." She then admitted that she had been sitting in the corner, explaining that she could not be expected to sit there and "giggly-gaggly play little games," because she was "not that hypocritical."

The trial judge urged Juror No. 5 to participate, to explain her concerns to the other jurors, and to ask them to be courteous, since they probably would attempt to get along if they understood her feelings. Juror No. 5 responded that she got along with individual jurors, but "now it is like them against me." The judge explained that deliberating means listening, sharing her views, and participating. Juror No. 5 replied, "I totally agree. I have attempted to do that." She agreed to go back in, talk to the other jurors, and to try to "square it away."

Later that day, however, the foreperson sent out another note, which read: "Wish to speak with the judge on a one and one basis regarding [Juror No. 5]. We feel that she is being disruptive and have [sic] shown animosity towards some of the jurors who has [sic] spoken to her regarding the reading and participation"; and, "Per the court's instruction, Juror No. 5 is still not willing to sit around the discussion table and participate. She chooses to continue to read her bible, and it is upsetting the other jurors. This distraction is making it difficult for us to deliberate. I and a few other jurors have spoke [sic] with [Juror No. 5] about this."

The court then undertook to question each juror individually in chambers. The judge was careful to caution each juror not to reveal the contents of deliberations, and asked for any comments about the information he had received regarding some difficulty concerning one of the jurors.

Juror No. 2 reported that the trouble began after Juror No. 5 became angry when she was not elected foreperson. It appeared to Juror No. 11 that Juror No. 5's personality totally changed once the foreperson was picked. Juror No. 6, the

foreperson, reported that Juror No. 5 participated until she failed to win election as foreperson. She then became hostile, and warned Juror No. 6 that she would "shut it down" if she were not left alone.

Six jurors reported that Juror No. 5 would sit with her back turned against the other jurors, and Juror No. 5 admitted turning her chair around and sitting with her back to the other jurors on both days of deliberations.

Juror No. 1 reported that Juror No. 5 would not sit with the others, and that she either read her book or appeared to sleep during deliberations. Five more jurors reported either that Juror No. 5 appeared to be sleeping much of the time, or she sat with her eyes closed.

Jurors No. 7, 8, and 9 reported that Juror No. 5 never looked at the exhibits, and the latter two reported that she did not review her notes. Eleven jurors reported that Juror No. 5 read her book while the others deliberated. Juror No. 5 admitted that she read a novel (not the Bible) during deliberations, although she then claimed that she was not actually reading. Juror No. 11 thought that Juror No. 5 was, in fact, reading, since she smiled occasionally while looking at her book, and the smile obviously did not relate to any discussion among the other jurors.

Ignoring the reports we have just summarized, Philip Morris points to comments by several jurors, including Juror No. 5, which would have supported a contrary resolution of the issue by the trial court. But we must accept the trial court's resolution of credibility issues and factual conflicts, unless they are not supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

Many of the juror statements upon which Philip Morris relies consist of the jurors' impressions and opinions. For example, Philip Morris quotes Juror No. 12, who said, "I think she's paying attention because when she hears ... things

and when she's ready to apply her input, she does it." But Juror No. 12 could not say whether Juror No. 5 was giving her full attention, or whether she had been really reading, and surmised that she was just making a gesture, like turning her back. It was the function of the trial court, considering all the circumstances, to make that determination. (See *People v. Cleveland*, *supra*, 25 Cal.4th at p. 485; *People v. Nesler*, *supra*, 16 Cal.4th at p. 582.)

Philip Morris lists various other juror statements that would support a different decision. Juror No. 5 voted, and five jurors said either that she gave her input or that she voiced her opinion on several different occasions, perhaps as many as five or six. Juror No. 1 said, however, that Juror No. 5 would respond only to questions put directly to her. And according to Juror No. 7, those responses consisted only of answering "yes" or "no," or repeating, "I hear you, I hear you, I hear you," when any comments were made to her.

Philip Morris also points out that many of the jurors were not certain whether Juror No. 5 had actually been asleep when her eyes were closed. But Juror No. 2 told the court that Juror No. 5 appeared to be sleeping when her eyes were closed, because she would lean in her chair, sometimes all the way over one side or the other. Juror No. 4 thought she was sleeping, because she closed her book and put her head down. Such physical indicia as eye closures, head nodding, and slumping in one's chair provide ample evidence of sleeping. (*People v. Johnson* (1993) 6 Cal.4th 1, 21.)

Philip Morris also attaches to its opening brief a declaration of Juror No. 5 dated June 7, 2001, and a letter from one of the other jurors, posted on the Internet on June 23, 2001. Since there has been no showing that either document was before the trial court at any time, we decline to consider them. (See *Doers v. Golden Gate Bridge etc.* Dist. (1979) 23 Cal.3d 180, 184-185, fn. 1.)

Philip Morris suggests that the facts of this case are similar to those of *People v. Bowers* (2001) 87 Cal.App.4th 722 (*Bowers*), which were held to justify a reversal. (See *id.* at p. 735.) We disagree. In *Bowers*, only one other juror reported that the discharged juror had slept, and there was no evidence of how long or how frequently. (*Id.* at p. 731.) Here, *all* the other jurors reported that Juror No. 5 appeared to sleep or read throughout the two days of deliberations.

In *Bowers*, behavior reported as inattentiveness consisted of the juror's habit of walking around with his arms crossed and refusing to respond, as a means of expressing that he did not agree with the other jurors' evaluation of the evidence. (*Bowers, supra*, 87 Cal.App.4th at pp. 730-731.) Here, substantial evidence established that Juror No. 5 separated herself physically from the other jurors, did not pay attention to their deliberations, and instead, slept or read a novel throughout the two days during which she was a member of the deliberating jury.

We conclude that such circumstances support a finding of a "demonstrable reality" that Juror No. 5 refused or was unable to deliberate, and that the trial court did not, therefore, abuse its discretion in discharging her. (See *People v. Cleveland, supra*, 25 Cal.4th at p. 484.)

9. Punitive Damages

Philip Morris moved for a new trial on the jury's award of \$3 billion in punitive damages. The trial court denied the motion, conditioned upon Boeken's acceptance of a reduction of punitive damages to \$100 million. Boeken accepted the reduction.

Philip Morris contends that even the reduced punitive damage award is excessive, whether measured under California law or the United States Constitution. In her cross-appeal, Boeken contends that the trial court erred in reducing the

award. We begin our review under the United States Constitution.

Punitive damage awards that are grossly excessive in relation to a state's legitimate interests in punishing unlawful conduct and deterring its repetition, violate a defendant's right to due process, guaranteed under the Fourteenth Amendment. (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568 (*BMW*).)

When it is asserted, as here, that an award is so grossly excessive as to violate due process, certain "guideposts" may provide meaningful assistance to the appellate court's review. (*BMW, supra*, 517 U.S. at pp. 574-575.) The *BMW* guideposts are "(1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 440.)

We independently apply the *BMW* guideposts to the facts to determine whether the award violates due process. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra*, 532 U.S. at pp. 439-440.) We defer, however, to the express and implied factual findings of the jury, unless they are clearly erroneous. (*Id.* at p. 440, fn. 14.)²¹

²¹ Since we conduct an independent review, we need not reach asserted errors in instructing with regard to punitive damages, such as Philip Morris's contention that the trial court should have instructed the jury "that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred," as later required by the *Supreme Court in State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 422 (*State Farm*), which had not yet been decided at the

The factor that provides the “most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” [Citation.]” (*State Farm, supra*, 538 U.S. at p. 419, quoting *BMW, supra*, 517 U.S. at p. 575.) Several subsidiary factors guide the determination of the degree of reprehensibility: (1) whether “the harm caused was physical as opposed to economic”; (2) whether “the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others”; (3) whether “the target of the conduct had financial vulnerability”; (4) whether “the conduct involved repeated actions or was an isolated incident”; and (5) whether “the harm was the result of intentional malice, trickery, or deceit, or mere accident.” (*State Farm, supra*, 538 U.S. at p. 419; *BMW, supra*, 517 U.S. at pp. 576-577.)

“The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. [Citation.]” (*State Farm, supra*, 538 U.S. at p. 419.)

In this case, each factor weighs in favor of the jury’s conclusion that punitive damages were appropriate. The evidence supports the conclusion that the harms caused to Boeken by Philip Morris’s fraud and defective product were physical, not merely economic. And Philip Morris’s conduct was repeated over a period of almost 50 years with an indif-

time of trial. (See *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 754.) If Boeken rejects our reduction of the punitive damage award, as explained within, we have no reason to assume that the trial court will not follow *State Farm*.

ference to the health or safety of Boeken, a physically and psychologically vulnerable target.

The product was marketed knowing that it was a dangerous product -- one that caused addiction and disease. Further, chemicals were added to the product to make it more addictive and easier to draw into the lungs, thus making it more dangerous. Boeken was drawn to the product at a young age, the Marlboro brand, with misleading advertising. He was kept smoking with misleading statements and falsehoods about smoking, disease, and addiction, the believability of which was enhanced by addiction; and Boeken's addiction was ensured when Marlboro's nicotine delivery was increased.

Boeken became financially vulnerable when he became unable to work after 1999. In the several years prior to 1999, his income had exceeded \$200,000 per year.

Philip Morris contends that its fraud cannot be deemed reprehensible, because the health risks of smoking were public knowledge for decades; because the State of California protected cigarette companies from liability for the ten-year period of former Civil Code section 1714.45; and because its tortious conduct was "remote," as shown by the trial court's instruction to the jury limiting liability for Philip Morris's fraudulent concealment to conduct that occurred prior to 1969.²²

The health risks of smoking may have been public knowledge for decades, but given the evidence of the false controversy created by Philip Morris, the adulterations added to the cigarettes, and the fact that Boeken failed to under-

²² We do not reach Philip Morris's contention that the trial court was correct in limiting liability for fraudulent concealment to pre-1969 acts of concealment, since no issue has been raised by either party that would require us to do so.

stand and appreciate the risks of smoking, this argument fails.

Dr. Benowitz testified that most people who smoke ten or more cigarettes a day are addicted, and highly addicted smokers are those who smoke one pack or more of cigarettes per day. Bocken was smoking two packs a day by the time he was 14. Once addicted, smokers are particularly susceptible to misrepresentations and misleading statements such as those that comprised Philip Morris's campaign of doubt. He explained that non-suicidal, rational people use denial and rationalization to continue doing what is obviously or apparently harming them. Addiction interferes with the individual smoker's perception of the risk he is taking, and he will seize upon the evidence that appears to minimize the risk. Given a choice of conflicting opinions, an addict will choose the opinion that would support continued use. The evidence establishes that Philip Morris understood this weakness at least by 1959, used it to deceive, and kept its research on addiction secret.

In addition to fraud, the evidence establishes that Philip Morris acted with a conscious disregard of consumer health and safety in the manufacture and marketing of a dangerous product, and intentionally took advantage of the consumer expectation that "light" cigarettes were safer.

Philip Morris knew that there was no reason to believe Marlboro Lights or Ultralights were any safer than its Reds.²³ Compensation has been described in scientific literature for 40 years, and Philip Morris's own research found no reduction in tar delivery for Marlboro Lights over regular ciga-

²³ It is not clear from the record whether Marlboro "Golds" and Marlboro "Lights" are two separate pack styles, or whether the parties simply used the terms interchangeably. There was testimony stating that Marlboro "Golds" are "light" or "low-tar" cigarettes.

rettes, but Philip Morris has only just recently initiated a study of human smokers to measure how much tar they actually take in. Although Philip Morris's laboratories were "state of the art," its studies of biological activity, using actual cigarettes that it markets, did not begin until 1999 or 2000.

Further demonstrating a conscious disregard for consumer safety, Philip Morris was *still* marketing "light" cigarettes at the time of trial, knowing that they may increase the risk of more serious cancers. And Philip Morris was still adding urea to Marlboro tobacco, causing more nicotine to be delivered more quickly to the smoker, as well as flavorings to create bronchodilators to open up the lungs.

Dr. Farone testified that while he was employed by Philip Morris, he was made aware by Philip Morris's own internal documents that low-tar cigarettes were not lower in tar delivery, and were not any safer than regular cigarettes. Philip Morris knew that smokers sucked light cigarettes harder and took longer puffs. Nevertheless, Philip Morris did no testing of the relative carcinogenicity of regular and light cigarettes.

The Marlboro Lights or Ultralights smoked by Boeken resulted in adenocarcinoma of the lung, which spread to his brain and spine. Since 1959, it has been known that smoking is the cause in more than 90 percent of the cases of this aggressive form of lung cancer. But the only biological testing of carcinogenicity conducted by Philip Morris was done in a secret lab out of the country, where a less carcinogenic Marlboro cigarette was developed in 1979, using reconstituted tobacco. It was never marketed, and senior Philip Morris's scientist, Dr. Osdene, received all reports from the secret lab at his home and destroyed them after reading them.

At the time of trial, about 16 million people in the United States smoked Marlboros. Most of these smokers believed that low-tar cigarettes were less hazardous. Indeed, Marlboro Golds outsell the Reds. There has, however, been an increase

in lung adenocarcinoma, a more aggressive and fast-spreading cancer, and it is accepted among experts that the rise is attributable to low-tar cigarettes. Nevertheless, Philip Morris continued to market so-called light Marlboros.

We cannot agree with Philip Morris's suggestion that the ten-year immunity provided by section 1714.45 makes its conduct less reprehensible. Philip Morris adds urea to make Marlboros more addictive, and flavorings to make it easier for the smoke to reach the lungs. Section 1714.45, as we have discussed, provided immunity only for unadulterated tobacco products. (See *Naegele, supra*, 28 Cal.4th at pp. 864-865; *Myers, supra*, 28 Cal.4th at p. 837.)

Philip Morris contends that harm to others cannot be considered in a punitive damage analysis. In *State Farm*, the Supreme Court held that due process prohibits the imposition of punitive damages for unrelated unlawful acts committed outside of the State's jurisdiction, or acts that were lawful in the jurisdiction where they occurred. (*State Farm, supra*, 538 U.S. at pp. 422-423.) The Court explained: "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." (*Id.* at p. 423.)

Similar out-of-state conduct may be relevant, however, to the issue of reprehensibility, when it demonstrates the deliberateness and culpability of the acts committed in the State where they are tortious, so long as the conduct has a "nexus to the specific harm suffered by the plaintiff." (*State Farm, supra*, 538 U.S. at p. 422.)

Philip Morris contends that its conduct in other states consisted solely of lawfully selling cigarettes, and that it was not shown to be similar to that which injured Boeken, be-

cause there was no evidence that it caused any injury to specific persons in other states.

We find nothing in *State Farm* that requires proof of injury to specific persons other than the plaintiff, wherever they reside, when the conduct in question is identical; and we find that a sufficient nexus has been shown here with Philip Morris's conduct in the other states. The very conduct that injured Boeken, directed to all smokers in the United States, repeated over many years with knowledge of the risk to human life and health, is probative of intentional deceit; and the national marketing of a defective product, knowing that consumers expected it to be less hazardous, is probative of a willful and conscious disregard of the danger to human life. (See *State Farm, supra*, 538 U.S. at pp. 423-424.)

Having concluded there is sufficient evidence supporting all five reprehensibility factors, a substantial punitive damage award was justified. We turn to *BMW's* remaining guideposts to determine independently whether the amount of punitive damages awarded was so excessive as to violate due process. (See *BMW, supra*, 517 U.S. at pp. 568, 574-575.)

The second and third *BMW* guideposts advise us to review "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award," and "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm, supra*, 538 U.S. at p. 418; *BMW, supra*, 517 U.S. at pp. 574-575.)²⁴

Prior to its decision in *State Farm*, the United States Supreme Court held that a punitive damage award four times the compensatory damages and 200 times the out-of-pocket

²⁴ The second criteria, being tied directly to the compensatory damages suffered by the plaintiff in the particular action, factors into the equation the Supreme Court's caveat that punishment for injury or harm to others not be included within the award.

expenses to be, under the facts of that case, "close to the line." (*Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1, 23.) In *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, the Court held that a ratio of 10 times the potential harm to plaintiffs "was not so 'grossly excessive' as to violate due process," although it was 526 times greater than the actual damages awarded by the jury. (*TXO Production Corp. v. Alliance Resources Corp.*, *supra*, 509 U.S. at p. 444; see also, *BMW*, *supra*, 517 U.S. at p. 582.) Here, the trial court's reduced award amounted to a ratio of approximately 18:1, punitive to compensatory damages.

In *State Farm*, the Supreme Court again refused, as it had in the past, "to impose a bright-line ratio which a punitive damages award cannot exceed"; and the Court observed that it had "'consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award' [citation]." (*State Farm*, *supra*, 538 U.S. at pp. 424-425, quoting *BMW*, *supra*, 517 U.S. at p. 582.)

The Court went on, however, to suggest appropriate ratios, stating: "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. [Citation.] We cited that 4-to-1 ratio again in *Gore*. [Citation.] The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. [Citation.] While these ratios are not binding, they are instructive." (*State Farm*, *supra*, 538 U.S. at p. 425, citing *BMW*, *supra*, 517 U.S. at p. 581, and *Pacific Mutual Life Insurance Co. v. Haslip*, *supra*, 499 U.S. at pp. 23-24.)

Relying upon the Supreme Court's suggestion that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," (*State Farm, supra*, 538 U.S. at p. 425; see *BMW, supra*, 517 U.S. at p. 582), Philip Morris contends that the compensatory award of \$5,539,127 was so substantial as to justify only a 1:1 ratio.

Philip Morris also relies upon the Supreme Court's warning that compensatory damages for emotional distress already contain a punitive element, which should not be duplicated in the punitive award. (*State Farm, supra*, 538 U.S. at p. 426.) Since Boeken's economist put his economic loss at more than \$2 million, Philip Morris suggests that the remaining \$3 million was compensation for emotional distress, also calling for a smaller ratio.

The Court's holding in *State Farm* was expressly based upon the fact that, *in that case*, "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries." (*State Farm, supra*, 538 U.S. at p. 426.) And as the Supreme Court cautioned "[t]he precise award ... must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*Id.* at p. 425.)

Certainly, some of Boeken's noneconomic damages may have been intended to compensate him for his emotional distress, since he did suffer "excruciating psychological pain," particularly while waiting to know whether the cancer had spread to his lymph nodes. But the verdict did not specify how much, if any, of the noneconomic damages were meant to compensate Boeken for his emotional distress. And Philip Morris ignores the overwhelming evidence of *physical* harm that was not present in *State Farm*.

The physical harm to Boeken caused by Philip Morris's fraud and defective product consisted of a 40-year addiction to cigarettes, chronic bronchitis, and a particularly aggressive

and fast-spreading form of lung cancer that causes death in virtually 100 percent of cases where the cancer spreads to lymph nodes. Boeken's cancer spread not only from his lung to his lymph nodes, but also to his brain and spine, making death a certainty. His chemotherapy and radiation therapy may have prolonged his life, but did not prevent death from the cancer caused by his smoking addiction.

Before discovering that the cancer had spread to his lymph nodes, Boeken underwent extremely painful surgery to remove the upper part of his right lung, and to insert seven drains through extremely painful incisions. Radiation and chemotherapy resulted in neuropathy, jumpy muscles, numbness in his feet and hands, painful muscle cramps, sometimes lasting an entire day, a burning sensation in his feet, imbalance, hallucinations, insomnia, wasting, constant nausea, vomiting, the loss of his sense of taste and smell, and aching bones in his knees and hips, like being "hit ... with a hammer." He suffered from an "explosive itch," his arms felt like "the muscle [was] being stripped from the bone," and he suffered fungal growth in his esophagus that made it difficult to swallow.

In light of this evidence of physical injury, we cannot agree that the award was unusually large or that it must have consisted mostly of damages for emotional distress. Thus, under the circumstances of *this* case, we cannot find that the compensatory award included a substantial punitive component requiring ratio of 1:1. (See *State Farm, supra*, 538 U.S. at p. 426.) This is particularly so in light of the potential harm in this case -- death.

With regard to "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases" (*State Farm, supra*, 538 U.S. at p. 418; *BMW, supra*, 517 U.S. at pp. 574-575), we note that the California Legislature has declared that "keeping children from beginning to use tobacco products in any form

and encouraging all persons to quit tobacco use shall be among the *highest priorities* in disease prevention for the State of California." (Health & Saf. Code, §§ 118950, subd. (a)(11), 104350, subd. (a)(9), *italics added*.)²⁵

California imposes civil fines for "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) A \$2,500 civil penalty may be assessed for each violation. (Bus. & Prof. Code, § 17206, subd. (a).) Boeken smoked two and one-half packs of Marlboros per day for 43 years, approximately 40,000 packs, as a result of Philip Morris's fraud. If the sale of each pack were considered a violation, Philip Morris's fine might equal the \$100 million in reduced punitive damages awarded by the trial court in this case.

We recognize that the record contains no evidence of typical fines for unlawful or unfair business practices, but our discussion illustrates the propriety of a large multiplier within constitutional limits. In *State Farm*, the Supreme Court noted its reference in *BMW* to "a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." (*State Farm*, *supra*, 538 U.S. at p. 425; citing *BMW*, *supra*, 517 U.S. at p. 581, and fn. 33.) Recognizing that history and applying *State Farm*'s principles, one California court applied a ratio of nearly 4:1, which was, in its opinion, the outer constitutional limit for an *unexceptional* fraud case that caused only economic damages that were "neither exceptionally high nor low," and in which the fraudulent conduct was "neither exceptionally extreme nor trivial." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal App.4th 1020, 1057.)

²⁵ To this end, California imposes civil penalties on persons who furnish cigarettes to minors. (Bus. & Prof. Code, § 22958.) It is also a crime, and carries a possible fine of \$1,000 per cigarette after the third offense. (Pen. Code, § 308, subd. (a).)

This case, by contrast, was exceptional, involving 40 years of fraud and the *continuing* marketing, with a conscious disregard of the danger to human life, of a product more dangerous than consumers expect. Further, although the compensatory damages were high, they were not exceptionally high, considering Boeken's former income and the pain he suffered. We conclude, therefore, that an appropriate ratio in this case may exceed 4:1.

In a recent product liability case involving a defective automobile occurring in a single model year, a California court applied a 5:1 ratio after an analysis of *State Farm's* requirements, choosing a multiplier greater than 4:1 due to the defendant's reckless disregard of consumers' safety and lives. (*Romo v. Ford Motor Co.*, *supra*, 113 Cal.App.4th at pp. 755, 763.) The case involved a roll-over of a 1978 Ford Bronco resulting in the death of three occupants and personal injury to three other occupants. The Court of Appeal concluded that evidence of the reprehensibility of Ford's conduct was substantial: "As stated in our original opinion, not only did Ford 'willfully and consciously ignore[] the dangers to human life inherent in the 1978 Bronco as designed, resulting in the deaths of three persons' [citation], it also ignored its own internal safety standards, created a false appearance of the presence of an integral roll-bar, and declined to test the strength of the roof before placing it in production. [Citation.]" (*Romo v. Ford Motor Co.* *supra*, 113 Cal.App.4th at p. 755.) Under that analysis, and the facts presented here, 40 years of fraud and Philip Morris's *continuing* conscious disregard for the safety and lives of consumers of its "low-tar" Marlboros justify an even greater multiplier.

We must now determine whether the circumstances of this case set the stage for one of the "few awards exceeding a single-digit ratio between punitive and compensatory damages [that] will satisfy due process" and therefore justify the 18:1 ratio of the reduced award. (*State Farm*, *supra*, 538 U.S. at p. 425.)

The United States Supreme Court has recognized, and reaffirmed in *State Farm*, that states have “legitimate interests in punishing unlawful conduct and deterring its repetition,” and that punitive damages may be properly imposed to further those interests. (*State Farm, supra*, 538 U.S. at p. 416, quoting *BMW, supra*, 517 U.S. at p. 568.)

Punitive damages are permitted by statute in California. (See Civ. Code, § 3294, subd. (a).) One of this state’s principal purposes in permitting punitive damages is the deterrence of “objectionable corporate policies” when “[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. [Citations.]” (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 810 (*Grimshaw*); see *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820.)

“Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles.” (*Grimshaw, supra*, 119 Cal.App.3d at p. 810, italics added.) A larger award may be necessary for this purpose, where reprehensible conduct has “exhibited a conscious and callous disregard of public safety in order to maximize corporate profits,” and has endangered the lives of thousands. (*Id.* at p. 819.) The California Supreme Court has repeatedly pointed out that “the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective. [Citations.]” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65; *Adams v. Murakami* (1991) 54 Cal.3d 105, 110; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)

“[O]bviously, the function of deterrence ... will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.]” (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928.) “An award which is so small that it can be simply written off as a

part of the cost of doing business would have no deterrent effect. An award which affects the company's pricing of its product and thereby affects its competitive advantage would serve as a deterrent. [Citation.]" (*Grimshaw, supra*, 119 Cal.App.3d at p. 820.)²⁶

The United States Supreme Court has not stated that wealth cannot be considered in determining punitive damages. Rather, it explained: "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction. [Citation.]" (*State Farm, supra*, 538 U.S. at p. 422.) But the wealth of a defendant may not otherwise justify a constitutionally excessive award. (*State Farm, supra*, 538 U.S. at p. 427.)

Nor has the Supreme Court rejected its earlier approbation of considering "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss." (*Pacific Mutual Life Insurance Co. v. Haslip, supra*, 499 U.S. at p. 22.) And it reaffirmed in *State Farm* that since "repeated mis-

²⁶ The most common measure of wealth for purposes of assessing punitive damages is net worth. (See *Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515.) Prior to *State Farm*, California courts routinely upheld punitive damage awards that amounted to a percentage of the defendant's net worth, from .05 percent in *Grimshaw, supra*, 119 Cal.App.3d at page 820, to 5 percent in *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1166, and not exceeding 10 percent. (See *Storage Services v. Oosterbaan, supra*, 214 Cal.App.3d at p. 515.) An award must not be disproportionate to the defendant's ability to pay, even if it is justified by the reprehensibility of the wrong and bears a reasonable relation to the harm it inflicted. (*Adams v. Murakami, supra*, 54 Cal.3d at p. 111.)

conduct is more reprehensible than an individual instance of malfeasance," "a recidivist may be punished more severely than a first offender," so long as "the conduct in question replicates the prior transgressions." (*State Farm, supra*, 538 U.S. at p. 423, quoting *BMW, supra*, 517 U.S. at p. 577.) Thus, profit may increase the degree of reprehensibility, with the similar result of justifying a greater punitive damage award. (See *State Farm, supra*, 538 U.S. at pp. 422-424, 426-427.)

We conclude that, as we interpret *State Farm*, wealth and profits may serve to increase a punitive damage award, but only to the extent that they were derived from the wrongful conduct that harmed the plaintiff or similar continuing conduct toward others, including such conduct in another state, so long as it is wrongful in the other state, thus demonstrating recidivist conduct and greater reprehensibility. (See *State Farm, supra*, 538 U.S. at pp. 422-424, 426-427.)

Here, there was evidence that, based upon its share of the domestic market, the net worth of Philip Morris USA at the time of trial was \$75 billion, and that its cigarette profits were \$14.7 million per day. Those figures, however, were based upon nationwide sales of all its cigarette brands, including lawful sales not procured by fraud, and including regular, as well as "light" cigarettes. We find no evidence in the record of Philip Morris's profits with regard to Marlboros during the time of its fraud, or its profits with regard to Marlboro Golds, Lights, or Ultralights, or of the contribution of those profits to its present wealth. Thus, we perceive the evidence of wealth and profits insufficient to justify an increase in punitive damages above a single digit ratio.

We are satisfied that the reprehensible conduct established by the evidence, repeated over four decades, and resulting in the death of Boeken, justifies the highest single digit ratio that will satisfy due process while furthering California's policy of punishment and deterrence. (See *State*

Farm, supra, 538 U.S. at p. 418; *BMW, supra*, 517 U.S. at pp. 574-575.)

Philip Morris contends that since other California juries have returned verdicts including substantial punitive damages for the same conduct, there is less need to further the state's interest in deterrence by imposing a higher multiplier. We agree that punitive damages previously imposed for the same conduct in another case, as well as possible future awards, are relevant in determining the amount of punitive damages required to sufficiently punish and deter. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App. 4th 1645, 1661.)

In support of this point, however, Philip Morris refers to the judgments in two cases that are not final. One has been reversed by the court of appeal, and in the other, review has been dismissed and the Remittitur has not yet been filed.²⁷ Further, in its one-paragraph argument on this point, Philip Morris makes no attempt to show that the facts justifying the punitive damage award were the same in both cases. *Potential* future awards in cases not shown to have identical issues are given little weight. (*Stevens v. Owens-Corning Fiberglas Corp., supra*, 49 Cal. App. 4th at p. 1661.)

Philip Morris contends that the state's interest in deterring future wrongs is satisfied by the 1998 Master Settlement Agreement (MSA) between Philip Morris and other tobacco companies and the states, including California.²⁸ Philip Morris contends that the MSA requires it to pay \$20.5 billion to the State of California over a number of years, beginning in

²⁷ See e.g., *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, modified and rehearing denied April 29, 2004; *Henley v. Philip Morris, Inc.*, No. S123023, review dismissed September 15, 2004, formerly published at 114 Cal.App.4th 1429; see now, 9 Cal.Rptr.3d 29.

²⁸ See the MSA online at <http://caag.state.ca.us/tobacco/pdf/1msa.pdf>.

2000 and ending in 2025, and that such sum is designed to deter Philip Morris from engaging in the same conduct upon which the punitive damage award is based in this case.

In particular, Philip Morris points out, the MSA prohibits youth targeting, bans virtually all outdoor and transit advertising, prohibits any agreement to limit or suppress research on the health effects of smoking, and requires the dissolution of the Tobacco Institute and the Council for Tobacco Research.

The purpose of the lawsuits underlying the MSA was to recover the states' costs of providing health care to persons with smoking-related illnesses. (*A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.* (2001 3d Cir.) 263 F.3d 239, 241.) The billions of dollars to be paid over the years by the signatory tobacco companies are intended to pay such claims, and to fund measures aimed at reducing underage smoking. (Health & Saf. Code, §§ 104555-104557; see *PTI, Inc. v. Philip Morris Inc.* (C.D.Cal. 2000) 100 F.Supp.2d 1179, 1185.)

We note that Philip Morris has referred to no evidence in the record or judicially noticed to support its claim that its share of the payments under the MSA will amount to \$20.5 billion in the period ending 2025. For proof of this assertion, Philip Morris refers only to argument in its memorandum of points and authorities in support of its motion for new trial. This is not evidence. (See *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1090.)

The MSA requires payments from all tobacco companies participating in the settlement, according to their relative market shares. "Market share" is defined by the MSA as a percentage of the total number of cigarettes sold in the 50 United States. "Relative market share" refers to a percentage of the total number of cigarettes shipped in or to the 50 United States. Since 1998, Philip Morris has sold fewer cigarettes, which may have reduced its market share. But since

there is no evidence in the record of the number of cigarettes sold or shipped by Philip Morris and the other participating tobacco companies, we cannot determine its market share or relative market share, and Philip Morris's figure of \$20.5 billion remains just argument.²⁹

Philip Morris has not shown from the provisions of the MSA that its purpose is punitive, rather than compensatory, relying instead upon the comments of a Florida court to that effect. (See *e.g.*, *Liggett Group Inc. v. Engle* (Fla. App. 3 Dist. 2003) 853 So.2d 434, 469, review granted.) Our review of the MSA reveals no provision prohibiting the participating tobacco companies from raising prices to pay the sums called for in the agreement. Since 1998, although Philip Morris has sold fewer cigarettes, it has increased its prices, with the result that revenues were up 47.99 percent in 2000. Thus, there may be no punitive or deterrent effect as a result of the payments required under the MSA, since Philip Morris may simply absorb the cost by raising prices without any competitive disadvantage, because the other participants are likely to do the same. (See *Grimshaw, supra*, 119 Cal.App.3d at p. 820; cf., *Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 929, fn. 14.)

We agree, however, that the MSA does provide Philip Morris with an incentive not to misrepresent the health risks of its products, and not to target underage smokers with its misrepresentations, since it prohibits it from doing so. On the other hand, it does not punish Philip Morris for its harm to Boeken. It does not deter Philip Morris from adding flavorings and chemicals that make its product more addictive. It does nothing to deter Philip Morris from marketing defective "light" cigarettes, knowing that they are more dangerous than the ordinary consumer expects.

²⁹ The MSA provides for calculation of shares by an independent auditor.

In light of our due process analysis under *State Farm*, we shall order a new trial on punitive damages, unless plaintiff agrees to a reduction of the judgment to reflect a punitive damage award of approximately nine times the compensatory award, the sum of \$50 million. Since we have determined that the record does not support a greater award that would satisfy the requirements of due process under the United States Constitution, we need not reach Boeken's claim on cross-appeal that the original award of \$3 billion is not excessive under California law. For the same reason, we need not reach Philip Morris's contention that it was the result of passion and prejudice.³⁰

DISPOSITION

The judgment is affirmed in all respects except the amount of punitive damages. The judgment is modified to reduce the punitive damage award to \$50 million, provided Boeken files a timely consent to such reduction in accordance with rule 24(d), California Rules of Court. If no such consent is filed within the time allowed, the judgment is re-

³⁰ This includes Philip Morris's complaint that in closing argument, Boeken's counsel committed misconduct by engaging in name-calling and inflammatory analogies, resulting in a punitive award based upon emotion and prejudice. Any prejudice had already dissipated prior to judgment due to the trial court's \$2.9 billion reduction in the award. In any event, since Philip Morris admits that it did not object to any but one of the remarks, and does not claim to have asked that the jury be admonished, it has forfeited any claim of misconduct. (See *Sabella v. Southern Pac. Co.*, *supra*, 70 Cal.2d at p. 318.) And Boeken denies misconduct, pointing out that the remarks were made in relation to negative comments about Philip Morris by others, as described by Philip Morris's own witnesses. If the issue of punitive damages is retried, Philip Morris will have the opportunity to object and show otherwise.

versed with regard to the amount of punitive damages only, and remanded for a new trial solely upon that issue. Both sides are to bear their own costs.

CERTIFIED FOR PUBLICATION

Hastings, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.

APPENDIX C

**SUPERIOR COURT OF THE STATE OF
CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

RICHARD BOEKEN,	)	CASE NO. BC 226593
)	
Plaintiff,	)	STATEMENT OF DECISION
	)	RE: DEFENDANT'S
VS.	)	MOTIONS FOR
	)	(1) A NEW TRIAL, AND
PHILIP MORRIS	)	(2) JUDGMENT
INCORPORATED, et al.	)	NOTWITHSTANDING
	)	THE VERDICT
<u>Defendants.</u>)	

I.

BACKGROUND

Trial in this action, brought by plaintiff Richard Boeken (Boeken) against defendant Philip Morris Incorporated (Philip Morris), commenced before a jury on March 19, 2001 and concluded on June 6, 2001 when the jury returned a verdict of \$5,539,127 in compensatory damages and \$3 billion in punitive damages. Philip Morris now moves for a new trial under CCP § 657 and, alternatively, for judgment notwithstanding the verdict pursuant to CCP § 629.

II.

MOTION FOR A NEW TRIAL

1. Punitive Damages.

Trial courts must, under California law, remit and/or grant motions for new trials in punitive damage cases where the amount of a jury award is excessive as a matter of law. *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910. Trial courts sit "not in an appellate capacity but as an independent trier of fact" when evaluating claims that punitive damage awards are excessive. *Id.* at 933. If the entire record, including reasonable inferences therefrom, reveals an excessive award, trial courts have a "duty to grant a new trial." *Tice v. Kaiser Co.* (1951) 102 Cal. App. 2d 44, 46.

To determine whether a punitive damage award satisfies California's legal requirements, this Court must evaluate three primary factors: (1) the relationship between punitive and compensatory damages awarded to the particular plaintiff; (2) defendant's financial condition; and (3) the degree of reprehensibility of defendant's conduct. *Neal*, 21 Cal. 3d at 928; *Adams v. Murakami* (1991) 54 Cal. 3d 105, 110.

The jury instruction given here, BAJI 14.71, accurately and succinctly characterizes California law, and states in part:

In arriving at any award of punitive damages, you are to consider the following: (1) The reprehensibility of the conduct of the defendant. (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition. (3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff.

The U.S. Constitution further requires trial court examination of allegedly excessive punitive verdicts to insure they

comply with due process requirements. *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568. As with state law, a California trial court must conduct "an independent examination of the relevant criteria" in assessing compliance with federal due process. *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.* (U.S. 2001) 121 S. Ct. 1678, 1685. Federal due process review of punitive damage awards reaches beyond simply examining a jury verdict to determine whether a rational basis exists to justify it. *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 456 (rejecting the rational basis test).¹

Federal due process requires that a punitive damage award possess "a reasonable relationship to compensatory damages" awarded to a particular plaintiff. *BMW*, 517 U.S. at 580. Courts must test the reasonableness of that relationship using three non-exclusive guideposts established by the *BMW* court. They are: (1) the degree of reprehensibility of defendant's conduct; (2) the relationship between punitive and compensatory damages awarded to the particular plaintiff; and (3) the civil and criminal penalties that could be imposed for comparable misconduct. *Id.* at 575-85.

A. Reprehensibility of Defendant's Conduct.

The jury plainly, and with substantial evidentiary support, found Philip Morris's conduct reprehensible. The record fully supports findings that Philip Morris knew by the late 1950s and early 1960s that the nicotine in cigarettes is highly addictive, that substances in cigarette tar cause lung cancer, and that no substantial medical or scientific doubt existed on these crucial facts. Nevertheless, motivated primarily by a professed desire to generate wealth, Philip Morris, in concert with other major American tobacco companies, consistently

¹ The United States Supreme Court did not rule in *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415 that a rational basis test is the constitutional standard of review.

endeavored through calculated misrepresentations to create doubts in the minds of smokers, especially addicted smokers such as Richard Boeken, that cigarettes are neither addictive nor disease-producing. In the language of a key internal document revealing the plan, Philip Morris and other tobacco companies set out to "create doubt about the health charge without actually denying it."

The evidence supports a finding that in 1954 Philip Morris promised in a public announcement run in over 400 newspapers nationwide to pursue objective research into the health risks of smoking and to release the results for the benefit of consumers. But, to the contrary, Philip Morris privately constrained research to produce results casting doubt on the alleged risks of smoking and went to extraordinary lengths to hide its own scientific information showing the company was fully aware of the true health dangers. One revealing memo written to the Company's top research scientist disclosed a practice of "burying" adverse internal research results ("[if the study proves nicotine is addictive] we will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original which I have.")

The record adequately demonstrates for purposes of this motion that Philip Morris publicly and falsely represented that: no proof existed that smoking causes cancer, knowing the opposite was true; that authorities have reached no agreement on what causes lung cancer, knowing the opposite was true; and that smoking is not addictive, knowing the opposite was true. While Philip Morris claims to have been relying on certain technical definitions of the language it used, substantial evidence was presented at trial showing that Philip Morris intended its publicly and widely disseminated words to be understood in a non-technical sense, communicating a false impression that the nicotine in cigarettes is not in fact addictive and that cigarette tars do not in fact cause cancer.

Information, widely disseminated by sources other than Philip Morris, revealed the true health risks of cigarettes. Nevertheless, in light of all the evidence presented, it appears that Phillip Morris's doubt-creating scheme fully succeeded in the case of Mr. Boeken and others addicted to the nicotine in cigarettes. Nationally renowned experts on smoking and health testified that addicts, such as Richard Boeken, predictably search for reasons to continue their drug consumption. Substantial evidence was presented demonstrating that Philip Morris seized on the opportunity presented by this predictable addictive behavior and provided the sought-after, albeit false, reasons in the form of statements calculated to create false doubt. This concerted effort to create doubt with misinformation was initiated long before the federal government enacted labeling statutes and was carried out for decades thereafter up through the late 1990s, coinciding almost exactly with Mr. Boeken's lifetime.

Substantial evidence supports a finding that Philip Morris was aware people who do not begin smoking in their adolescence are unlikely to become heavily addicted, life-long smokers. Most people who are mature enough to understand the risks involved, and who are not already addicted, do not begin smoking. Substantial evidence further supports a finding that, with this in mind, Philip Morris focused its marketing on children, including the adolescent Richard Boeken in the 1950s, placing advertising where children were most likely to see it and crafting ads appealing to youthful passions for feelings of independence, identity and acceptance.

An internal Philip Morris document describes a strategy of targeting minors to produce "a rapidly increasing pool of teenagers from which to replace smokers lost through normal attrition." The evidence supports a finding that the pool Philip Morris had in mind included the under-age Richard Boeken, who became fully addicted to smoking before reaching his 18th birthday. The evidence further indicates that Philip Morris monitored the relative market share of its

Marlboro brand – the brand smoked by Boeken from his teens – to insure it maintained dominance among underage smokers to whom cigarettes could not be sold legally.

Evidence indicating a nationwide pattern of deceit involving millions of American consumers was properly admitted at trial. Proof “of a nationwide pattern of tortious conduct” is specifically admissible to show reprehensibility. *BMW*, 517 U.S. at 576-77 (citing *TXO*, 509 U.S. at 462 n. 28, rejecting TXO’s objection to the admission of its alleged wrongdoing in other parts of the country and stating “[u]nder well-settled law, ... factors such as these are typically considered in assessing punitive damages.”)²

Philip Morris urges the Court to conclude, as a matter of law, that its actions were not reprehensible in light of certain cigarette-related California and federal statutes. Citing the Public Health Cigarette Act of 1969, 15 U.S.C. §§ 1331 *et seq.*, Philip Morris argues that Congress has determined “that it is not reprehensible ... to market and advertise cigarettes with the warning prescribed in that statute.” Philip Morris is not being punished for marketing cigarettes, but rather for engaging in a fraudulent business scheme initiated long before passage of the Act. The Act left open the power of states to punish defendants for conduct of the sort proved here. *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 538-40.

California Civil Code § 1714.45 (enacted in 1987 and repealed 1998) does not evidence a legislative determination that conduct of the sort in evidence here is not reprehensible as a matter of law. On the contrary, circumstances surrounding repeal of § 1714.45 suggest some, if not a majority, of

² Philip Morris did not object at trial to the admission of out-of-state information. It did move *in limine* to exclude evidence of alleged wrongdoing occurring in other countries, and that motion was granted and consistently enforced throughout the trial.

California's legislators in 1998 were deeply disturbed by revelations flowing from ongoing investigations of Philip Morris.³

Exercising its independent judgment, the Court finds the preceding facts, supported by substantial evidence, true for the purposes of assessing the reasonableness of the jury's punitive damages award. Philip Morris's conduct was in fact reprehensible in every sense of the word, both legal and moral.

B. Relationship Between Punitive and Compensatory Damages Awarded to the Particular Plaintiff.

California law focuses on the necessity to punish the particular wrongdoer in determining the amount of a legally appropriate punitive-to-compensatory ratio. *See, e.g., Neal*, 21 Cal. 3d at 928 & n. 13. While deterring others is a legitimate function of punitive damages, and BAJI 14.71 instructs juries to award punitive damages "for the sake of example," the quantum selected must be assessed in relation to the defendant and only its wrongdoing. The law expects that in appropriately punishing the particular wrongdoer, the wrongdoer and others will be deterred from engaging in the same or similar conduct. The law does not, however, authorize punitive damage theories attempting to punish one wrongdoer for the conduct of others in order to deter those others from future misconduct. As indicated by the California Supreme Court, "the quintessence of punitive damages is to deter future misconduct by the defendant." *Adams v. Murakami* (1991) 54 Cal. 3d 105, 110. Consequently, BAJI 14.71 specifically instructs fact-finders to consider "the amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition."

³ *See*, discussion of Legislative intent at p. 23, *infra*.

California law focuses on the actual harm suffered by the plaintiff in determining the denominator of the relational analysis. See e.g., *Neal, supra*. BAJI 14.71 instructs factfinders to consider "the injury, harm or damage actually suffered by the plaintiff" in arriving at a reasonable punitive-to-compensatory ratio.⁴ Plaintiff here urges the Court to consider values, outside the evidence, relating to the potential harm to others in assessing the appropriate punitive damage denominator. The Court, however, must consider only the ratio between punitive damages and injuries suffered by the plaintiff, not other persons. Plaintiff incorrectly urges the Court to characterize the resultant ratio as 3 to 10, based on unlitigated assumptions as to how many Californians may in the future sue Philip Morris and what their individual recoveries might theoretically be. Such an approach is not authorized by existing case law.

No exact mathematical ratio exists giving courts a bright line in deciding when the punitive-to-compensatory damages relationship becomes excessive as a matter of law. Indeed, the United States Supreme Court in *BMW* warned against any "categorical approach" to ratios, noting that it had "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula ..." *BMW*, 517 U.S. at 582. See also, *Finney v. Lockhart* (1950) 35 Cal. 2d 161, 164 ("[T]here is no fixed ratio ...")

Here, the jury settled on figures producing a 540-to-1 ratio. Such a ratio is not unprecedented. See e.g., *TXO Prod.*

⁴ The Court rejected a Philip Morris drafted instruction directing the jury to ignore all harm done by defendant to persons other than Mr. Boeken, regardless of where they lived. BAJI 14.71 precisely covers the matter in connection with determining an appropriate punitive-to-compensatory ratio ("the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff") and correctly does not apply a "plaintiff only" limitation on the question of reprehensibility.

Corp. v. Alliance Resources Corp. (1993) 509 U.S. 443 (upholding a \$10 million award with a 526-to-1 ratio). On the other hand, in a purely economic damages case, the *BMW* court cautioned that a ratio in the 500-to-1 range should "raise a suspicious judicial eyebrow." *BMW*, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 481, O'Connor, J., dissenting). In an intentional fraud case, the United States Supreme Court has deemed a ratio of 4-to-1 "close to the [constitutional] line." *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23-24.

Plaintiff lists a string of cases in which California courts have let stand punitive damages awards substantially exceeding a 4-to-1 ratio.⁵ Philip Morris correctly observes that none of these cases involved compensatory awards in the range of \$5 million, and argues that the amount of the compensatory award, if high, must, as a matter of law, operate to independently reduce the potential size of any punitive damage award, pointing out that no California appellate court in any published opinion has ever upheld a ratio of greater than 3-to-1 when the compensatory award was more than \$1 million. In the end, this argument leads to the unsupportable proposition that those who commit the most devastating and reprehensible wrongs are given caps on their punitive damages exposure which those who commit lesser wrongs do not receive – a proposition standing the legitimate and necessary role of punitive damages on its head. While no reported case with compensatory damages exceeding \$1 million exceeds a ratio of 3-to-1, that does not mean that 3-to-1 establishes a bright line beyond which no jury must go in California, especially in cases where a defendant's conduct is so utterly reprehensi-

⁵ *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910 (78-to-1); *Finney v. Lockhart* (1950) 35 Cal. 2d 161 (2000-to-1); *Moore v. American United Life Ins. Co.* (1984) 150 Cal. App. 3d 610 (83-to-1); *Wetherbee v. United Ins. Co. of America* (1971) 18 Cal. App. 3d 266 (190-to-1).

ble, and has such devastating and widespread consequences, as here presented.

C. Defendant's Financial Condition.

Philip Morris offered no evidence of its financial condition and rested entirely on the state of plaintiff's evidence. Plaintiff's expert economist, Robert Johnson, testified essentially un rebutted, that Philip Morris's domestic tobacco company has a value of between \$30 and \$35 billion. The worth of the company's domestic operation is not reported separately in the parent company's annual report and must be broken out using estimations involving income and revenue. California law permits using defendant's wealth, income, or both to estimate financial condition. *Little v. Snuyvesant Life Ins. Co.* (1977) 67 Cal. App. 3d 451; *Wetherbee v. United States Ins. Co. of America* (1971) 18 Cal. App. 3d 266. A strict accountant's "assets vs. liabilities" calculation is not required, and Philip Morris offered no expert testimony at trial rebutting the validity of the methodology used by Mr. Johnson.

While Robert Johnson offered evidence indicating a potential value exceeding \$35 billion, ample evidence, uncontradicted by credible contra evidence, exists on the record to support a finding that defendant's current worth at the time of trial was between \$30 and \$35 billion. Exercising its independent judgment, the Court finds this fact true for the purposes of assessing the reasonableness of the jury's punitive damages award.

Plaintiff suggests, and the Court agrees, that California cases tend to limit punitive damages awards to sums generally in a range under 10% of a defendant's total worth. See, *Goshgarian v. George* (1984) 161 Cal. App. 3d 1214, 1228. As with punitive-to-compensatory ratios, this figure is not a matter of mathematical certainty or invariant. See, *Villabona v. Springer* (1996) 43 Cal. App. 4th 1525, 1539-41 (upholding 23.1%); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*

(1984) 155 Cal. App. 3d 381, 391-92 (upholding 17.5%). The jury's award here is within the percentage of worth guideline generally allowed by California law.

D. Civil and Criminal Penalties That Could Be Imposed for Comparable Misconduct.

Finding analogous penalty provisions sanctioning frauds leading to wrongful death is a difficult, if not impossible, undertaking. Plaintiff points to the California Unfair Competition Act proscribing "any unlawful, unfair or fraudulent business act or practice ..." Cal. Bus. & Prof. Code § 17200. Using the potential multiples achievable for discrete antitrust violations prescribed by the California Unfair Trade Practices Act, a different law, plaintiff attempts an analogy assuming the sale of each pack of cigarettes as a single violation, leading to staggering potential fines at \$1000 per sale. Plaintiff also cites Penal Code provisions purporting to permit fines of \$10,000 for each violation, and separate provisions allowing courts to fine employees individually for their misconduct. Philip Morris offers no analogies other than to criticize those proposed by plaintiff.

The Court has not on its own found any convincing analogous civil or criminal penalties that could be imposed for comparable misconduct, and considers this factor relatively neutral in assessing the reasonableness of the jury's punitive damages award here.

E. Deterrence of Future Conduct.

Citing details of the Master Settlement Agreement with the state Attorneys General and the company's very recent, and admittedly belated, public confession that the nicotine in cigarettes is addictive and that tars in cigarettes cause lung cancer, Philip Morris argues punishment is inappropriate here because there is no possible future conduct requiring deterrence. Philip Morris had a full opportunity to present the precise details of the Master Settlement Agreement (MSA) to

the jury in mitigation of, or as an argument against, punitive damages. While that agreement does prohibit much of the misconduct at issue here, it by no means guarantees that Philip Morris will now become the model corporate citizen which it now claims to be.

Effective deterrence involves more than just prohibiting conduct, and requires changing mindsets. Philip Morris has, in the past, demonstrated a willingness and ability to achieve its ends by creative means, and the Court cannot predict what those means might in the future be for a corporation with enormous resources profiting from the sale of a life threatening product. Philip Morris can, of course, continue to lawfully sell its product, but it must do so with a mindset far different from that evidenced by its corporate history to date. Such a sea change may have begun to occur at Philip Morris, but, in the exercise of independent judgment in light of all the evidence at trial, the Court finds that deterrence in the form of substantial punitive damages is both necessary and proper to prevent Philip Morris's return to the old mindset or its crafting of ever-more ingenious ways to generate wealth through tortious means.

F. Potential for Future Punitive Damages Awards.

Philip Morris correctly argues that "[t]he likelihood of future damage awards may also be considered" in assessing the reasonableness of a punitive damages award. *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal. App. 4th 1645, 1661. Given the evidence presented at trial here, and the fact that Philip Morris refused to accept even a scintilla of responsibility for the harm it has done to Richard Boeken and other similarly situated consumers of its products, the Court does not doubt that Philip Morris will continue to incur large punitive damages awards in California and elsewhere. Given the law that a party is fully liable for injuries to another when that party's tortious misconduct constitutes a substantial contributing factor to the injury suffered, it appears highly likely

that future juries will continue to hold Philip Morris liable for large compensatory awards, even when they believe the plaintiff's conduct (choice to smoke) also constitutes a substantial factor contributing to the injuries. In this setting, when Philip Morris refuses to accept any responsibility, moral or otherwise, it is easy to see how juries will predictably find the company deserving of substantial punishment.⁶

If Philip Morris continues to make the argument, attempted with this jury, that even though its highest executives may have lied to the American public about the risks of cigarettes, it bears absolutely no moral or legal responsibility for the deaths of people who consumed its products, because every consumer should have known from the outset that the executives were not truthful, then, in this Court's view based on the evidence examined through weeks of trial, Philip Morris is entirely correct that it will continue to incur substantial future compensatory and punitive damage awards by other juries.

This Court takes into consideration the potential for future damage awards in its ultimate decision here, but with the caveat that it cannot speculate at the amounts or number of such awards and cannot rely on such predictions in reaching a final punitive damage result.

After balancing all the relevant considerations, the Court finds that the jury's punitive damage award was legally excessive because it produced an excessive punitive-to-compensatory ratio. While the Court cannot know with certainty what ratio is exactly correct, it finds that a ratio of ap-

⁶ In the present case, Philip Morris elected not to bifurcate the punitive damages portion of the case. That choice, which it freely made, while not giving the jury a feared "two bites at the apple," deprived the company of the traditional opportunity to acknowledge responsibility after liability had been determined but before the jury had assessed punitive damages.

proximately 20-to-1 is appropriate in this particular circumstance. No party disputes the rationality of the jury's compensatory award of \$5,539,127, and the Court, exercising its independent judgment determines from all the evidence that a punitive award of \$100 million is a reasonable sum to be awarded against Philip Morris in these circumstances.

2. Plaintiff's Causes of Action.

A. Scope of Preemption.

The only claims to which preemption applies involve post-1969 failures to warn through advertising and promotional activities. The Court specifically instructed the jury not to consider such claims for any conduct occurring after July 1, 1969, the effective date of the Federal Cigarette Labeling Act (FCLAA) 15 U.S.C. §§ 1331, *et seq.* The FCLAA does not preempt any claims submitted to the jury here.

The United States Supreme Court in *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504 expressly rejected the implied preemption theory which defendant advanced from the outset of this case. This Court denied motions *in limine* on the preemption assertions now advanced, and the Court again denies them for the reasons stated in its written *in limine* decision.

Specifically, *Cipollone* does not bar post-1969 claims that Philip Morris committed affirmative fraud by making knowingly false statements, whether in advertisements, promotions, or elsewhere. The Court in *Cipollone* held that the FCLAA preempts post-1969 failure to warn claims: (1) that a manufacturer should have included additional, or more clearly stated, warnings; (2) that cigarette advertising and promotions which, though not false, neutralized federally mandated warning labels; or (3) that cigarette advertisements or promotions concealed material facts. *Cipollone*, 505 U.S. at 524, 527-28. Claims such as tried here, including affirmative fraud, are not preempted – a result not altered by the

United States Supreme Court's recent decision in *Lorillard Tobacco Co. v. Reilly* (2001) 121 S. Ct. 2404.

All the evidence admitted at trial was relevant to non-preempted claims. Defendant has not cited one instance in which objected-to but admitted evidence related only to a preempted claim.

B. Reliance.

Plaintiff tried this case on a theory of indirect reliance. One who makes false representations need not have a particular victim in mind. *Mirkin v. Wasserman* (1993) 5 Cal. 4th 1082, 1092. Fraudulent advertising, as an example, is actionable on a theory of indirect reliance. See e.g., *Committee on Children's Television, Inc. v. General Foods* (1983) 35 Cal. 3d 197.

Plaintiff did not need to prove that he remembered actually seeing or hearing Philip Morris's false statements. Reliance may be inferred here from the conduct and beliefs of Mr. Boeken consistent with his reliance on Philip Morris's false, doubt-creating statements, including those made by others acting in concert with Philip Morris, the exact content of which Boeken cannot now recall. As the California Supreme Court stated in *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 814, reliance "may be inferred from the circumstances," which may provide "much stronger and more satisfactory evidence" of reliance than "direct testimony to the same effect." An "inference of reliance arises" when the plaintiff's actions, as here, were "consistent with reliance on the representation." *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal. 3d 355, 363. This result is not inconsistent with *Mirkin* because reliance is not presumed but rather inferred from circumstantial evidence, in the same way facts are inferred circumstantially in other cases. The fact of reliance may be inferred circumstantially from the widespread nature, and false content, of the representations and Mr. Boeken's behavior and beliefs consistent with them.

The cumulative impact of mass disseminated misrepresentations in cases such as here presented permits a circumstantial inference (as distinguished from a presumption) of reliance. *Children's Television*, 35 Cal. 3d at 218-19 (where an inference of reliance was permitted from false statements regarding sugared cereals even though the children involved could not recall the specific false statements). While the California Supreme Court in *Mirkin* distinguished Vasquez and *Occidental Land*, it did not reject the traditional availability of inferred reliance. Moreover, *Mirkin* did not render *Children's Advertising* inapposite. *Mirkin* disallowed a claim by plaintiffs who said they had generally relied on the integrity of the stock market but, unlike Boeken, did not hear any misrepresentations, either directly or indirectly, to justify that reliance.

While Philip Morris may be correct that fraud claims in California cannot rest solely on visual images, *Maneely v. General Motors Corp.* (9th Cir. 1977) 108 F.3d 1176, 1181, Boeken's claims rest on misinformation which Philip Morris's own documents, and the documents of those acting in concert with Philip Morris, say was widely and purposefully communicated over a period of decades to consumers and the public at large to the effect, among other things, that, in Richard Boeken's words, "tobacco is not harmful" and "there is no good proof or scientific fact that it causes cancer ..."

The record contains adequate evidence from which a circumstantial inference can reasonably be drawn that Mr. Boeken relied on Philip Morris's misrepresentations forming the basis of the fraud claims here. The Court, exercising its independent judgment, finds it true for the purposes of deciding this motion.

C. Evidence of Felony Convictions.

The Court exercised its discretion to exclude Mr. Boeken's felony convictions under Evidence Code § 352 on grounds that their prejudicial effect outweighed their proba-

tive value. Plaintiff's cancer is not related to any prior convictions. He did not serve time for any conviction. The convictions were remote in time, with the most recent occurring 14 years ago.

While Mr. Boeken's credibility was in issue, the Court believed that a probability of undue prejudice existed and that a limiting instruction would most likely not have cured it. The Court, in its discretion, decided against taking the risk in view of the remoteness of the convictions.

D. Strict Products Liability and Negligence.

Plaintiff's experts testified that there were reasonable alternative cigarette designs that would have been safer and that would have reduced the risks. The products liability instructions given repeatedly referred to risks and benefits inherent in the *design* itself, as distinguished from the product itself. It is sufficient for plaintiff to demonstrate the existence of a safer cigarette design or that the risk of harm could have been reduced. Restatement of Law Third, Torts: Products Liability § 2. The jury assessed the experts' credibility and their testimony was not so far out of reasonable bounds that this Court should, in exercising its independent judgment, disturb the verdict by granting Philip Morris a new trial.

E. Excusing Juror No. 5.

The Court finds that it properly excused Juror No. 5 for the reasons stated in its Statement of Decision prepared and sealed concurrently with the action taken during trial.

F. Passion and Prejudice.

Philip Morris seeks to set aside the entire verdict on grounds that plaintiff's counsel engaged in misconduct so pervasive that it prejudiced the jury to a degree such that defendant could not receive a fair trial. This trial was hard and fairly fought by counsel on both sides, with the parties well represented at every turn by exemplary lawyers who consis-

tently adhered the highest standards of courtroom conduct and civility. On rare occasion, counsel on both sides made statements in front of the jury warranting objections that were made and sustained. The jury understood they were to disregard statements of counsel to which objections were sustained.

Relations of counsel with the jury and Court were such that neither side exhibited, or communicated privately to the Court, any fear of rising to make meritorious objections. Counsel were well aware that the Court would listen in chambers to any reasonable complaints they might have concerning the conduct of opposing counsel.

If, as Philip Morris now asserts for the purposes of this motion, plaintiff's counsel engaged in a sustained pattern of misconduct so egregious that it threatened to deprive defendant of a fair trial, Philip Morris could have, and should have, raised the issue during trial outside the presence of the jury. The Court was ready and willing to sustain objections to particular questions, statements, or arguments of counsel, and did so whenever an appropriate objection was stated. When such objections were sustained, as they were on occasion, counsel on both sides immediately and courteously rephrased or abandoned the point.

In these circumstances, failure to object constitutes a waiver by highly competent and effective counsel of the grounds now asserted for a new trial. None of the cited instances of alleged misconduct by plaintiff's counsel were so egregious standing alone or together that they could not have been cured by an appropriate limiting instruction which the Court would have given if properly requested.

The second portion of defendant's motion for a new trial relating to matters other than punitive damages is denied in its entirety.

III.

JUDGMENT NOTWITHSTANDING THE VERDICT

Philip Morris moves for judgment notwithstanding the verdict on grounds which, in many ways, overlap those stated in its motion for a new trial. Here the trial court must not reweigh the evidence or judge the credibility of witnesses. A judgment notwithstanding the verdict may be granted only if it appears from all the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion must be denied. *Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal. App. 4th 1497, 1510.

A. Misrepresentation.

Philip Morris urges the Court to enter judgment notwithstanding the verdict on grounds that plaintiff failed to prove that Mr. Boeken ever saw or heard any actionable misrepresentation. As discussed previously, Boeken may prove his case based on a theory in indirect and inferred reliance. Richard Boeken testified that in the 1960s he received misinformation of the nature shown to have been disseminated by Philip Morris, in concert with other members of the tobacco industry and their agents, to the effect that, in Mr. Boeken's words, "tobacco is not harmful" and that "there is no good proof or scientific fact that it causes cancer ..." Boeken further recalled that in the 1970s he had an understanding that the tobacco industry, including Philip Morris, "disagreed that their product was harmful." Boeken testified, and the jury must have believed, that he trusted and relied on what he heard.

Under the evidence presented, a trier of fact could reasonably infer circumstantially that Philip Morris and those acting in concert with it (including public relations entities

formed in the early 1950s to disseminate misleading information on behalf of Philip Morris and others) were the ultimate sources of the misinformation relied on by Mr. Boeken. The fact that Mr. Boeken, after 35 years of addiction and given his present state of health, could not identify specific sources of misinformation is neither unexpected nor fatal to his case. His behavior over the years and present memory are consistent with him having relied on the Philip Morris-sponsored strategy to create false doubt in the minds of people such as Mr. Boeken. The evidence is sufficient to support a finding by the jury that Mr. Boeken's recollections are about what one would expect to hear from a truthful, life-long, addicted smoker who began consuming cigarettes in the 1950s.

There is sufficient evidence on the record to support findings that during the relevant time period Mr. Boeken read or heard actionable misrepresentations made by Philip Morris, and those acting in concert with it, concerning addiction and disease, and that Boeken in fact relied on them to his unwarranted detriment.

B. Concealment.

The record contains substantial evidence that prior to enactment of the FCLAA, Philip Morris possessed research showing that smoking is in fact addicting and cancer-causing, and that Philip Morris actively concealed that information from its customers and the public at large. There is also substantial evidence that Philip Morris actively engaged in premeditated half-truths calculated to convey the misimpression that genuine questions existed, prior to passage of the FCLAA, as to whether cigarettes were in fact addictive or cancer-causing.

Cases cited by Philip Morris do not require the Court to find, as a matter of law, that the health risks of cigarettes had become matters of such common knowledge before passage of the FCLAA that a judgment must be entered for defendant notwithstanding the verdict. Common knowledge is, in this

instance, a question of fact – one which cuts both ways for Philip Morris and Mr. Boeken. On the one hand, common knowledge in the form of doubt-producing misinformation, supplied by Philip Morris and those in concert with it, is what Richard Boeken claims he relied on to his detriment. On the other hand, common knowledge in the form of accurate information, primarily supplied by persons and entities other than Philip Morris and those acting in concert with it, is what Philip Morris relies on to exonerate itself from liability to Richard Boeken. The record contains days of testimony and many documents pointing in different directions on this central question, and the jury's assessment prevails because it is supported by substantial evidence whichever way the facts are found.

C. Products Liability.

Philip Morris asserts that "the common knowledge described above also disposes of plaintiff's product liability claims" under "the consumer expectations test." That test focuses on the extent of danger contemplated by the ordinary consumer possessed of "ordinary knowledge common to the community." *Barker v. Lull Eng'g Co.* (1978) 20 Cal. 3d 413, 425. The Court is not persuaded that Philip Morris merits a new trial on this issue for the reasons stated in the preceding paragraph.

Philip Morris further asserts that the risk/benefits test of products liability does not apply to cigarettes because that test only applies to cases involving avoidable dangers. *Barker*, 20 Cal. 3d at 430. Philip Morris views the risks associated with cigarettes in black and white, all-or-nothing, terms, rather than as a matter of variable risk, as seen by plaintiff. Ultimately, plaintiff's is the legally correct view. It is sufficient for plaintiff to show that the risk of harm could have been reduced by a known design. Restatement of Law Third, Torts: Products Liability § 2. Plaintiff's experts testified that there were reasonable alternative cigarette designs

that would have been safer and that would have reduced the risks.

There is sufficient evidence on the record to support the jury's products liability verdict.

D. Statutory Immunity.

Section 1714.45 of the Civil Code, enacted in 1988, immunized manufacturers from liability for inherently unsafe products in certain circumstances where ordinary consumers know the products are unsafe and, nevertheless, choose to consume them. As originally passed, the statute expressly listed tobacco as an immunized product. Ten years later the Legislature changed its mind, amended § 1714.45, and removed statutory immunity for tobacco. Philip Morris, however, contends, among other things, that the statute still immunizes tobacco products from liability for conduct occurring before the January 1, 1998 effective date of the amendment because the amendment is not retroactive. Plaintiff contends, among other things, that the 1998 amendment was intended to have retroactive effect and, in any event, the question of retroactivity does not arise when, as here, a latent disease is first diagnosed after the amendment takes effect.

Philip Morris vigorously and correctly points out that courts do not lightly give retroactive effect to statutes creating civil liability or removing immunities that protect against liability that would otherwise exist. The question is properly within the province of the Legislature, and courts insure that it remains there by requiring a clear indication of retroactive intent before giving a statute retroactive effect. *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1207.

The 1998 amendment to Civil Code § 1714.45 does not expressly use the term "retroactive," but that is not the end of the inquiry. This Court must read the amendment, and all its provisions, as a whole, giving effect to all material statutory terms, if possible, and avoiding any construction rendering

key provisions meaningless. *Skeketee v. Lintz, Williams & Rothberg* (1985) 38 Cal. 3d 46, 51-52.

The amendment began as Senate Bill 67 introduced by Senator Quentin Kopp. The legislative facts underlying the Bill were summarized in a Comment to the Senate Judiciary Committee analysis dated April 8, 1997:

According to the author's office ... "Evidence has now become available showing tobacco companies may have deliberately manipulated the level of nicotine, a powerfully addictive substance, in tobacco products so as to create and sustain addiction in smokers. In addition, evidence shows the tobacco companies have systemically suppressed and concealed material information and waged an aggressive campaign of disinformation about the health consequences of tobacco use."⁷

These legislative facts prompted the Legislature to eliminate the immunity originally provided tobacco products by Civil Code § 1714.45. A concern arose in the amending process that courts might not apply the legislation retroactively. On April 8, 1997, a Senate Judiciary Committee Comment pointed out:

Some concern has been expressed that SB 67 would apply only to causes of action arising on or after January 1, 1998, assuming it is enacted this year. In the absence of specific language in the legislation specifying the retroactive application, a measure will operate prospectively only upon its enactment.

⁷ Authors' statements evidence Legislative intent. "A legislator's statement is entitled to consideration ... when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion. *California Teachers Assn. v. San Diego Community College District* (1981) 28 Cal. 3d 692, 700.

One week , almost certainly in response to these expressed concerns, the Senate added subdivision (d) [now (f)] to "clarify" the Legislature's intent by stating that claims which "were or are brought shall be determined on their merits, without imposition of any claim of statutory bar or categorical defense." This language, coupled with the underlying legislative facts and circumstances prompting it, suggests a legislative determination that tobacco products should never have been immunized in the first instance.

Civil Code § 1714.45(d) expressly provides that the statute, as amended, "shall apply to all product liability actions pending on, or commenced after, January 1, 1998." That means that on the day the amendment became effective, described cases, including Mr. Boeken's, must be decided on their merits without the statutory bar of former § 1714.45 or the categorical defense it had embodied. Sections 1714.45(d) and (f) operate in tandem, and can only achieve their intended purpose in the case of tobacco-related latent injuries by giving them retroactive effect.

The 1998 amendment is replete with past tense language. As an example, the Legislature expressly removed the statutory bar for "California smokers ... who have suffered or incurred injuries." Civil Code § 1714.45(f). It is difficult to understand how the Legislature could have used the term "have suffered or incurred" to describe only smokers who might in the future suffer injuries from conduct occurring solely after January 1, 1998. If the Legislature had intended for the amendment to reach only people who start smoking after January 1, 1998, it would not have used past tense in describing the timing of the injuries involved. If the legislative facts in view are true (i.e., "the tobacco companies have systemically suppressed and concealed material information and waged an aggressive campaign of disinformation about

the health consequences of tobacco use⁸), then failing to provide retroactivity would have prevented suits by present and past smokers whom the Legislature saw as potential victims of the same conduct that prompted the Legislature to amend Civil Code § 1714.45. Limiting the amendment to prospective application would, in effect, require the Court to conclude the Legislature chose to avoid dealing with the very legislative facts which it plainly had in mind.

Philip Morris contends the Legislature could not retroactively remove § 1714.45's statutory bar and categorical defense, even if it wanted to, because the statute created immutable vested rights. But the immunity codified by Civil Code § 1714.45 is not constitutionally immutable, and can be legislatively abrogated if the state's interests outweigh countervailing public reliance interests. In determining whether a retroactive statute contravenes due process, courts consider the significance of the state interest involved, the importance of retroactive application to effectuation of that interest, the extent of reliance on the former law, the legitimacy of that reliance, the extent of actions taken based on that reliance, and the extent to which retroactive application of the new law would disrupt those actions. *In re Marriage of Bouquet* (1976) 16 Cal. 3d 583, 592.

The state interests supporting the 1998 amendments, protecting past and future California tobacco product consumers, are undeniably compelling. There is: no evidence Philip Morris took any action in reliance on § 1714.45 other than presumably pleading it as a bar to smokers' lawsuits; no evidence that § 1714.45 significantly altered Philip Morris' methods of doing business or caused the company to conduct business differently in California, as contrasted with its business practices in other states where it did not have the protec-

⁸ Interestingly, the jury must have found these legislative facts true, making them judicial facts as well.

tion of § 1714.45; and no evidence that retroactive application of the amendment would disrupt any business practices adopted by Philip Morris in reliance on § 1714.45. The Court must conclude, therefore, that retroactive application of the amendment does not offend due process here.

Plaintiff essentially characterizes retroactivity as a red herring because Mr. Boeken was first diagnosed with lung cancer after the 1998 amendment became effective. The California Supreme Court grappled with a similar assertion in *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal. 4th 520, 534-35 in the context of Proposition 51 and stated that: "[In suits] for personal injuries arising from a latent disease ... applying the law in effect when plaintiff is first diagnosed with the disease, or when the symptoms of the disease first become manifest, will not work a retroactive application of [a statute]." In a later decision the California Supreme Court added (in a different context): "[T]he critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." *People v. Grant* (1999) 20 Cal. 4th 150, 157. While the *Buttram* court carefully limited its decision to address Proposition 51 concerns, its core rationale rested on a compelling need to give full effect to the tort reform measures adopted in Proposition 51 in light of the long-term latency involved with asbestos-related disease. That same policy requirement arises here. It is not necessary, however, to apply *Buttram* in the manner urged by plaintiff, because this Court finds the Legislature intended § 1714.45 to apply retroactively.

E. Punitive Damages.

Philip Morris contends that even if the evidence supports findings of fraud under a preponderance standard, it does not support such findings under the required clear and convincing test. The Court finds that the evidence in the record, and highlighted in the discussion of defendant's motion for a new

trial on the issue of punitive damages, is sufficient to support a punitive damages verdict rendered by clear and convincing evidence.

IV.

ORDERS

Defendant's Motion for a New Trial is denied, with the exception that Philip Morris's Motion for a New Trial is granted on grounds of excessive punitive damages, subject, however, to the condition that the motion is denied if plaintiff consents to a reduction of punitive damages to the sum of \$100 million and files a written consent to the reduction by August 24, 2001. If plaintiff does not accept this remission, a new trial is granted solely on the issue of punitive damages.

Defendant's Motion for Judgment Notwithstanding the Verdict is denied in its entirety.

DATED: August 9, 2001

/s/
CHARLES W. McCOY JR.
Judge of the Superior Court

APPENDIX D

**Court of Appeal, Second Appellate District, Division
Four – No. B152959**

S133884

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JUDY BOEKEN, Plaintiff and Respondent,

v.

**PHILIP MORRIS INCORPORATED, Defendant and
Appellant.**

Motion to strike petition for review denied.
Request for judicial notice denied.
Petitions for review DENIED.

Werdegar, J., was absent and did not participate.

SUPREME COURT

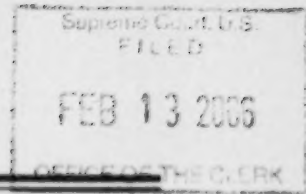
FILED

AUG 10 2005

Frederick K. Ohlrich Clerk
DEPUTY

/s/ _____
Chief Judge

(4)
No. 05-594



IN THE
Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

JUDY BOEKEN, AS TRUSTEE, ETC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

**RESPONSE TO PETITION
FOR A WRIT OF CERTIORARI**

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February 13, 2006

QUESTION PRESENTED

Whether the court below erred in concluding that due process required the punitive damages award to be capped at roughly nine times the \$5.54 million compensatory damages award.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	2
A. Statement of Facts	2
1. Richard Boeken's Addiction and Death Linked to Marlboro Cigarettes	2
2. The Scientific Proof by 1954 That Cigarette Smoking Causes Lung Cancer ...	3
3. Nicotine, an Addictive Drug	4
4. Philip Morris's Exploitation of Addiction in Designing Its Cigarettes	4
5. Philip Morris's Exploitation of Addiction in Its Public Relations Strategy Focused on Creating Doubt in the Minds of Vulnerable, Addicted Smokers	6
6. Philip Morris's Heavy Marketing to Children, Including Boeken	11
7. Philip Morris's Profits From Its Fraud Scheme	13
B. Proceedings Below	14
1. Argument to the Jury on Punitive Damages	14
2. The Jury's Verdict	22

3. The Trial Court's Remittitur Order	22
4. The Court of Appeal's Decision	23
ARGUMENT	24
I. REVIEW OF THE PUNITIVE DAMAGES JUDGMENT IS WARRANTED BECAUSE THE LOWER COURTS ARE IN CONFLICT OVER THE PROPER APPLICATION OF THE DUE PROCESS "RATIO" GUIDEPOST AND RELATED PRINCIPLES	24
II. THE PREEMPTION ISSUE MAY BE AN ADDITIONAL ISSUE WORTHY OF REVIEW ...	29
CONCLUSION	30

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE:</u>
<i>Action Marine, Inc. v. Continental Carbon, Inc.</i> , 2006 WL 173653 (M.D. Ala. Jan. 23, 2006)	25
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1996)	28
<i>Boerner v. Brown & Williamson Tobacco Co.</i> , 394 F.3d 594 (8th Cir. 2005)	26
<i>Clark v. Chrysler Corp.</i> , 2006 WL 229506 (6th Cir. Feb. 1, 2006)	26-28
<i>Cooper Industries, Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001)	28
<i>Day v. Ingle's Markets, Inc.</i> , 2006 WL 239290 (E.D. Tenn. 2006)	26
<i>Honda Motor Co., Ltd. v. Oberg</i> , 512 U.S. 415 (1994) . .	28
<i>Johnson v. Ford Motor Co.</i> , 135 Cal.App.4th 137 (2005)	25-26
<i>Krysa v. Payne</i> , 176 S.W.3d 150 (Mo. App. 2005)	25
<i>Mathias v. Accor Economy Lodging, Inc.</i> , 347 F.3d 672 (7th Cir. 2003)	28
<i>Neal v. Farmers Ins. Exchange</i> , 21 Cal.3d 910 (1978)	23
<i>Romanski v. Detroit Entertainment, L.L.C.</i> , 428 F.3d 629 (6th Cir. 2005), <i>reh'g en banc denied</i> (Feb. 6, 2006)	26-27
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	24-25, 27-28
<i>Superior Federal Bank v. Jones & Mackey Construction Co., LLC</i> , 2005 WL 3307074 (Ark. App. Dec. 7, 2005)	25
<i>TXO Production Corp. v. Alliance Resources Corp.</i> , 509 U.S. 443 (1993)	28
<i>Williams v. Philip Morris Inc.</i> , 2006 WL 242456 (Or. Feb. 2, 2006)	26

STATUTES AND RULES:

PAGE:

Supreme Court Rules 14.1(g)(i) & 14.4	1, 30
Cal. Code Civ. P. § 904.1(a)(4)	23

APPENDIX

APPENDIX A:

Reporter's Daily Transcript of Plaintiff's Closing Argument	1a
----------------------------------------------------------------------	----

APPENDIX B:

Excerpt From Brief of Respondent and Cross-Appellant in <i>Boeken v. Philip Morris Incorporated</i> (Cal. Ct. Appeal, 2d Dist., Div. 4, No. B152959), filed April 1, 2003	178a
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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent Judy Boeken hereby responds to the petition for certiorari filed by Philip Morris USA ("PM").

INTRODUCTION

As to the subject given the most attention in PM's petition, the application by the court below of the due process framework for "gross excessiveness" review of punitive damages (Question 2), Boeken endorses the certworthiness of the petition. The conflicts among the lower federal courts concerning the proper application of the "ratio" guidepost, and related matters, are plainly worthy of review. Indeed, confident that an explication by this Court of the correct legal framework for due process review of punitive damages will ultimately redound to her benefit, Boeken has filed a separate petition in case No. 05-600 urging the Court to review these issues. Boeken suggests that before granting review this Court might rephrase Question 2 along the lines set forth on page i, *supra*. Although all the issues discussed by PM and Boeken are fairly included within PM's Question 2, the alternative wording may be more appropriate.

Boeken does not oppose a grant of review on Question 1 concerning preemption of the "consumer expectations" product liability claim in the event this issue, in the view of the Court, adds to the certworthiness of the case as a whole. However, Boeken is obliged to point out a potential defect in the petition to the degree it rests on the suggestion that Boeken "argued at trial that [PM] should be held liable and punished for failing to give consumers a specific warning that the Marlboro Lights cigarettes he smoked were as dangerous as regular cigarettes." PM Pet. at 2. Despite Rules 14.1(g)(i) & 14.4, record citations related to this suggestion were not included in the petition. It is by no means apparent that this suggestion is supported by the record. But even assuming it is unsupported by the record, possibly the preemption issue itself does not hinge on it.

STATEMENT OF THE CASE

PM suggests that at trial, Boeken's argument for punitive damages included a claim that PM should be punished for a design defect in its cigarettes under a "consumer expectations" theory which PM claims is preempted. PM Pet. at 2 (stating Boeken sought damages for "common-law fraud and product liability" and "argued at trial that [PM] should be held liable and punished for failing to give consumers a specific warning that the Marlboro Lights cigarettes he smoked were as dangerous as regular cigarettes.").

Boeken's punitive damages case was focused on fraud, not product liability. The jury was told by counsel for both sides that Boeken was not seeking to punish PM, or even hold it liable for compensatory damages, for failing to warn consumers that Marlboro Lights were as dangerous as regular cigarettes. The following summary of the evidence and argument pertaining to punitive damages should suffice to ensure clarity regarding the grounds on which punitive damages were sought and awarded in this case.

A. Statement of Facts

1. Richard Boeken's Addiction and Death Linked to Marlboro Cigarettes

In 1957 at age 13, Richard Boeken began smoking Marlboro cigarettes manufactured by PM, enticed by its advertising campaign targeting young boys. See pp 11-12, *infra*. Boeken quickly became addicted, smoking two packs of Marlboros a day for decades. RT 1980-81.¹ Starting in 1967 he made numerous efforts to quit. Due to his heavy addiction and the influence of repeated denials by PM and its coconspirators that smoking was dangerous, Boeken was

¹ "RT" denotes references to the Reporter's Transcript (the trial transcript). "CT" denotes references to the Clerk's Transcript (other filings in the case). For convenience we refer herein to both Richard Boeken and his wife and successor, respondent Judy Boeken, as "Boeken."

unable to quit. RT 1976-96, 2004-05, 2321-26, 3327-32; CT 13558-59. In 1999 Boeken was diagnosed with lung cancer caused by the Marlboro cigarettes, and he filed this lawsuit. CT 1-66. Boeken died on January 16, 2002, at age 57.

2. The Scientific Proof by 1954 That Cigarette Smoking Causes Lung Cancer

Lung cancer was rare before 1950. RT 1323-24, 1336-38, 1353-56, 2067-74. Before 1950 there was no "serious concern," even in the medical and scientific community, "that cigarette smoking might be a cause of lung cancer." RT 5193; *see also* RT 5200, 5220.

Between 1950 and 1954, epidemiological studies were published in leading medical journals indicating that cigarette smoking causes lung cancer. RT 2082-87; *see also* RT 1334-42, 1355-59, 1363, 5213-17, 5220. One study specifically concluded "that cigarette smoking was an important cause of lung cancer." RT 1335, 1357-58.

In 1953 the *New England Journal of Medicine* observed that "the evidence of an association between cigarette smoking and lung cancer [is] so strong that it represent[s] proof of causation, proof as people normally use the word" — that is, "[p]roof within the every day meaning of the word," obligating doctors to take action to protect their patients. RT 2091-93, 2120. The data cited in the *New England Journal of Medicine* editorial "could not be refuted and [were] never refuted," and "there is no question at all that the issue was proven by 1953." RT 2120-21. *See also* RT 2088. Within several years a worldwide scientific consensus that cigarettes are the principal cause of lung cancer was reached, once other scientists reviewed and corroborated the 1953 data. *E.g.*, RT 1347-51, 2087-91, 2094-2108, 2120; RT 1360-61, 1372-77. *See also* PM Pet. App. 157a-158a.

The scientific proof that cigarettes are an important cause of lung cancer has remained undisturbed since 1953. The average smoker has a risk of lung cancer 20 times that of a nonsmoker; the risk is higher in heavier smokers. RT 1410. About 100,000 Americans die each year from lung cancer caused by cigarette smoking. RT 2278-79. Another

300,000 die each year from other diseases caused by cigarette smoking, principally coronary artery disease and emphysema. *Id.*; RT 1993. Cigarette smoking is "the single most important cause of death in cigarette smokers in developed countries." RT 1412. It kills half of all smokers, shortening their lives by an average of seven years. RT 1995.

3. Nicotine, an Addictive Drug

Cigarettes contain nicotine, a highly addictive drug. RT 1906. By flooding a smoker's brain with artificially high levels of neurotransmitters, nicotine triggers powerful and permanent changes in the structure and function of the brain, affecting mood, cognitive abilities, and behavior. RT 1906-10, 1917-21, 1927-30. Most smokers must keep ingesting the nicotine merely "to function normally," RT 1921-22, 1924-25, and they experience severe and long-lasting withdrawal symptoms if they try to stop. RT 1925-28. Nicotine is particularly addictive when ingested in aerosol form via cigarette smoke, just as "smoking crack cocaine is the most addicting way [to] use cocaine." RT 1911-13. Nicotine is at least as addictive as heroin or alcohol. RT 1932-34.

About 70% of smokers would like to quit, and 35% make a serious effort to quit each year. RT 1946, 2029-30. But "very few succeed" in quitting — about 2.5% of smokers each year, RT 1946, typically only on their fourth or fifth attempt. RT 1922, 1926, 1928-29, 1946. Only half of smokers who make repeated quit attempts succeed. RT 1921-24, 2330-31.

4. Philip Morris's Exploitation of Addiction in Designing Its Cigarettes

For decades PM has been aware smokers buy its cigarettes because they are addicted to the nicotine in them, and it has designed its cigarettes to make them more addictive. PM's business premise has been that its product is nicotine, sold in its most addictive form.

As early as 1957, PM's R&D plan noted that the product "is really not the cigarette but smoke," which potentially

could be regulated by the federal government as a drug. Ex. 17 at 1000304887. In 1959, PM's internal scientific documents listed "Addiction" as one reason people smoked. Ex. 226 at 1-2. Its scientists suggested taking advantage of this fact by redesigning the company's cigarettes to provide "*relatively high nicotine and low tar*," observing that "such a product is vital to our cigarette business." Ex. 1642 at 2.

In 1972, one of PM's top researchers on nicotine noted that "[s]moke is beyond question the most optimized vehicle of nicotine and the cigarette the most optimized dispenser of smoke," and thus, a "cigarette should be conceived not as a product but as a package. The product is nicotine." Ex. 3 at 5-6.

In 1980, PM's chief scientist, Thomas Osedene, informed the Board of Directors that research on nicotine was a "high priority" at the company because "the thing we sell most is nicotine." Ex. 148 at 1.

For years PM studied the addictive effects of nicotine and of chemicals other than nicotine that might be added to cigarettes to maintain smokers' addiction and make cigarettes even more addictive. *E.g.*, RT 1657-81, 1717-34, 1764-65; RT 1506-08, 1574-76, 1582-86. It focused on determining "the optimal nicotine/tar ratio" for its so-called "light" cigarettes. Ex. 148 at 5. This research assumed "that low tar cigarettes may need nicotine supplements to be rated acceptable." *Id.* at 6.

The point of the nicotine research program was not to determine whether nicotine is addictive. That "was never in doubt." RT 1745-46. When one of PM's top executives visited a PM laboratory and "saw the rats self-administering nicotine," and employees started explaining some of the research, the executive cut them off: "we all know it is addicting, it's addicting as hell." RT 1731-33.

"[E]ssentially functioning as a drug company," as one of its scientists described the operation, RT 1674, PM transformed the cigarette from "a natural product, rolled up and smoked," into a "sophisticatedly engineered product." RT 1810-11. By the early '80s PM had "the scientific technology to remove all the nicotine from the product." RT 1701. Its engineers "could take out nicotine. They could add

in nicotine. They could manipulate the levels of nicotine." RT 1701-02.

PM routinely manipulated the nicotine/tar ratio of its low-tar cigarettes, RT 1581-84, developing "many, many different kinds of manipulations," for example, by "adding chemicals . . . to help sweep out the nicotine" such as urea (a component of urine) which, when burned, creates ammonia and helps release additional nicotine from the cigarette. RT 1583-86. In the 1970s, R.J. Reynolds, one of PM's competitors, concluded the success of the Marlboro brand during the 1960s and 1970s was due to PM's use of chemical manipulation to artificially boost the pH level of cigarette smoke and thereby release into the smoker's body "more free-base nicotine." RT 2331-33. *See also* PM Pet. App. 11a-12a.

None of this was disclosed to consumers or regulators. PM went to elaborate lengths to conceal from the outside world that it was manipulating the nicotine level and hence addictiveness of its cigarettes. RT 1681, 1689-96, 1706-15, 1720-21. In 1980 a top PM scientist noted that although research on nicotine promised "significant scientific developments profoundly influencing the industry," it was "where our attorneys least want us to be." Fearing that "tacit acknowledgment that nicotine is a drug" could trigger FDA regulation, the attorneys "insist[ed] upon a clandestine effort in order to keep nicotine the drug in low profile." Ex. 423 at 1-2. *See also* RT 1962-66.

5. Philip Morris's Exploitation of Addiction in Its Public Relations Strategy Focused on Creating Doubt in the Minds of Vulnerable, Addicted Smokers

By the early 1950s, scientific proof had established that cigarettes were an important cause of lung cancer, and even the initial reports of these findings in the popular press had been enough to sharply depress cigarette sales. RT 2682-85; *see also* Ex. 295. Illustrating "how serious the problem" was, "salesmen in the industry [were] frantically alarmed and . . . the decline in tobacco stocks on the stock market exchange ha[d] caused grave concern" Ex. 295 at 4.

In response, PM launched a disinformation scheme to counter the threat to its business posed by this truthful information about cigarettes. On December 15, 1953, top executives of PM and other tobacco companies, acting as coconspirators, met in New York and set in motion "a public relations campaign which [was] positive in nature and [was] entirely 'pro-cigarettes.'" Ex. 295 at 2. According to an internal memorandum by the public relations firm hired for this task, from the beginning PM and the other companies envisioned that the campaign would be "a long-term, continuing program, since they feel that the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future." *Id.* See also RT 2680-89.

In 1972 one implementer of this campaign, looking back to its genesis, summarized it as follows: "For nearly twenty years, this industry has employed a single strategy to defend itself" involving in large part "*creating doubt* about the health charge without actually denying it," a message "articulated by variations on the theme that, 'the case is not proved.'" Ex. 330 at 1-2 (emphasis added). Because of their addiction to nicotine, the heavy smokers targeted by PM were extraordinarily vulnerable to such messages designed to create doubt about the health charge. Addicted smokers rationalize continued use "despite obvious or apparent harm" by embracing anything that will allow them to "minimize the risk" and believe that "what I'm doing is not really as nonsensical as it seems." RT 2002-03, 2339-41. See also RT 1892-1904, 1930-33, 1943-47.

Tobacco industry strategists who carried out the fraud scheme noted in their internal communications that if a smoker is addicted, he or she lacks "free choice" to rationally weigh the risks and benefits of smoking. RT 2006-08 (quoting Ex. 388 at 2). A key element of the strategy was that "heavy smokers . . . must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor." Ex. 330 at 1-2. PM's own expert conceded that if the manufacturer of an addictive product were to "purposely go out and create doubt" in the minds of consumers about whether it was dangerous,

addicted consumers not currently suffering "any health consequences . . . would have little motivation to change." RT 5709-11.

This PM did. Over a period of decades PM and its coconspirators, directly and through intermediaries created by them, made a string of false statements calculated to create false doubts in the minds of addicted consumers.

On January 4, 1954, PM and its coconspirators ran a full-page announcement in newspapers in over 400 cities entitled "A Frank Statement to Cigarette Smokers." Ex. 363; RT 2236-40, 2681-83. They assured the public that "[w]e accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business," and "pledg[ed] aid and assistance to the research effort into all phases of tobacco use and health," overseen by "scientists disinterested in the cigarette industry." Ex. 363.

Referencing "a theory that cigarette smoking is in some way linked with lung cancer in human beings," the "Frank Statement" asserted that according to "[d]istinguished authorities . . . [t]here is no proof that cigarette smoking is one of the causes" of lung cancer, because the "statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life." Ex. 363. This was a "ludicrous statement," "extraordinarily untrue," "just a bald untruth." RT 1369-71. Further, "there was abundant information . . . in the published literature to prove that it wasn't true to any responsible observer." RT 2240-41. Yet during the rest of the 1950s such indefensible statements were endlessly repeated in a massive media blitz orchestrated by the companies' public relations firm. *E.g.*, Ex. 305, 404.

The vulnerability of addicted heavy smokers to these communications conveying a scientifically ridiculous message was confirmed by the sharp upward rise of cigarette smoking shortly after the Frank Statement and related media coverage appeared. Ex. 295 at 4; RT 2684. After the fraud scheme was launched, spearheaded by the "Frank Statement," those carrying out the fraud scheme on behalf of PM remarked favorably on the quick success of these communications in causing addicted smokers to doubt

and discount the scientific evidence on the danger of cigarettes. *E.g.*, Ex. 305 at 21.

The disinformation efforts of PM and its coconspirators continued with great vigor in the 1960s.

In 1961, the Tobacco Institute, the trade organization formed by PM and its coconspirators, *see* RT 4353-56, issued a press release commenting on a *Journal of the American Medical Association* article summarizing the preventative medicine steps necessitated by the smoking-lung cancer link. Ex. 340. The press release countered that "the cause or causes of lung cancer continue to be unknown," and that whether cigarettes cause lung cancer is "a subject of much disagreement in the scientific world." *Id.* This was false. RT 1378-83; *see also* RT 2258-60. Sir Richard Doll, one of the world's leading scientists on the health effects of tobacco in 1961, testified based on his direct knowledge that in 1961, "100 percent of cancer researchers that were concerned with lung cancer would have said that was false." RT 1383-85.

PM knew it was false. In one 1961 document, for example, its scientists observed that "[c]arcinogens are found in practically every class of compounds in smoke" and thus cigarettes cannot be considered "medically acceptable." Ex. 35 at 2024947183, -191, -195; *see also* Ex. 21 at 1; RT 2230-32, 2242-49. Even so, PM made and honored a "gentlemen's agreement" with other tobacco companies never to do the consumer product safety testing that would be necessary to make cigarettes medically acceptable, and never to try to compete on safety. RT 1509-15, 1546-63. When its scientists managed despite these restrictions to develop safer cigarette designs, PM did not implement them. RT 1522-26. *Compare* Ex. 67 at 2.

In 1962, the Tobacco Institute, of which PM was a member, attacked CBS for a supposedly "one-sided presentation against tobacco" in a program on teenage smokers, which it complained expressed "extreme opinions and prejudices," failing "to come to grips with the basic point — that the causes of lung cancer are still unknown" Ex. 342 at 1. This attack was "absolutely false." RT 2260-63.

In March 1965, a top tobacco executive appearing on behalf of PM and other tobacco companies testified before Congress and falsely stated that "there is a very high degree of uncertainty" about whether "smoking causes lung cancer or any other disease." Ex. 54 at 2, 4; *see also* RT 2253-58. In making this statement the executive had "to disregard the top scientists in his own company, who had been telling him in black and white the exact opposite for years and years." RT 2257; *see also* RT 2250-52.

In December 1965, on behalf of PM and the other companies, the Tobacco Institute urged the restoration of "needed perspective to the controversy over smoking and health," asserting: "Research to date has not established whether smoking is or is not causally involved in such diseases as lung cancer and heart disease, despite efforts to make it seem otherwise. The matter remains an open question" Ex. 648 at 1-2.

In 1984, on behalf of PM and other tobacco companies, the Tobacco Institute issued a public report on the supposed "Cigarette Controversy" in connection with congressional hearings, Ex. 456; *see* RT 2270-76, asserting it is not scientifically possible to state that cigarette smoking causes lung cancer" Ex. 456 at 6. This was "a complete falsehood" — "scientifically outrageous," a "misrepresentation of science." RT 2272-73. The report insisted that "[t]here is a cigarette controversy" and asserted the connection between cigarette smoking and lung cancer is just "a theory." Ex. 456 at 2. This was a scientifically "irresponsible" statement, and an "outrageous falsehood" — "[a]bsolutely, incontrovertibly, a falsehood." RT 2275-76.

Polling data confirm the success of the effort of PM and its coconspirators who worked assiduously for decades to create doubt in the minds of addicted smokers to supply them a rationalization against quitting smoking. RT 2267-69, 3118-30, 3139-46, 3167-71, 3186-91, 3196-97, 3203-06, 3211-13, 3234; RT 1991-92; Ex. 330 at 3.

PM's choice of fraud over honesty as a business strategy was explicit. Industries other than the tobacco industry whose activities were linked to lung cancer, such as the coal mining and nickel refining industries, recognized and

credited the scientific data against them and promptly instituted measures to protect people from lung cancer. RT 1379-83. When presented with proposals that a more honest approach be taken, *e.g.*, Ex. 65 at 1, 3, 6; Ex. 85 at 2; Ex. 91 at 1, PM executives quashed them to protect profits — as they put it, to avoid “the potential of digging our own grave.” Ex. 132. *See also* Ex. 136 at 1 (more honest approach rejected because it “could open the door to legal suits in which the industry would have no defense,” and “we need to keep all the dedicated smokers we can”); Ex. 91 at 1.

6. Philip Morris's Heavy Marketing to Children, Including Boeken

Because smoking, with its extreme risk of addiction and eventual suffering and death, is not an activity in which most rational adults making a cost-benefit analysis of their long-term interests would choose to engage, PM has for decades made children as young as 12 the focus of its marketing efforts.

Children are an attractive target for PM because “90 percent of those who smoke have had their first cigarette before 18,” RT 2568, 2812-13, and smokers rarely switch brands once they become regular smokers. RT 2640. “Today’s teenager is tomorrow’s potential regular customer,” and “it is during the teenage years that the initial brand choice is made,” a PM marketing strategy memo noted in 1981. Ex. 218 at 1000390808.

In the early 1950s Marlboro was marketed as a lady’s cigarette through advertising appealing primarily to adult women. RT 2547-48. Beginning in 1955, PM repositioned the brand through an advertising campaign “aimed at young people,” principally “starters . . . under the age of 18,” RT 2568, in particular “young males.” RT 2584. *See also* RT 2617-18. The campaign employed the powerful technique of variation within a consistent theme. RT 2562, 2612. A series of advertisements depicted handsome, confident, virile, tough, independent men from different walks of life, culminating in a cowboy, the “Marlboro Man” — “models that a young boy would want to emulate.” RT 2557; *see also*

RT 2512, 2553-62, 2565-69, 2572-73, 2583-86, 2611-14, 2617, 2619-25, 2632-35, 2794, 2815-22.

During the 1950s and 1960s PM's massive Marlboro advertising campaign included heavy advertising on television shows with "a disproportionate number of children watching them, well above 30 percent of their audience." RT 2609; *see also* RT 2600-11.

Richard Bocken "started smoking Marlboros" while growing up in California at age 13, in 1957, because he felt "[t]hey were everywhere. They advertised everywhere. They represented [a] very macho, sophisticated, hip way of smoking. . . . [T]he message I had was that it was the one and only cigarette to smoke, and I liked them." CT 13538; *see also* RT 2439-40, 2641, 3331-32; CT 13537. Bocken becoming a Marlboro smoker at age 13 was a typical result of the Marlboro advertising campaign. RT 2537-44, 2569-73.

Internal documents reveal that PM carefully monitored the results of its marketing efforts in winning market share among children age 12 and even younger. RT 4395-4421. For example, a 1974 marketing plan on Marlboro's dominance of the youth market reported data on "the dynamics of the market among smokers below the age of 24." Ex. 239.01 at 1. PM set "no lower age limit" for this study, in which "[y]oung smokers were sought out . . . at popular 'hang-outs.'" *Id.* at 1-2. The study documented that Marlboro remained "the most frequent 'first regular brand'" among young smokers. *Id.* at 5-6. *See also* RT 2644-47.

A 1981 PM marketing plan, entitled "Young Smokers," favorably noted the increased "prevalence of teenage smoking" over the prior fifteen years and how Marlboro's "success . . . during its most rapid growth period" was in part "because it became *the* brand of choice among teenagers who then stuck with it as they grew older." Ex. 218.01 at 1000390805, -808. The document noted PM's "high share of the market among the youngest smokers," and even divided the analysis of market share among young smokers into three groups (ages 12-14, 15-16, and 17-18). *Id.* at 1000390809-11, -28. *See also* RT 2636-44.

The younger a person starts smoking, the more easily addicted he or she will likely become, and 13-year-old

Boeken quickly became a heavily addicted, two-pack-a-day Marlboro smoker. RT 1980-81. Smoking interfered with Boeken's athletics and he suffered from bouts of bronchitis, so Boeken made at least eight serious efforts to quit. Like half of all smokers who make multiple quit attempts, see p. 4, *supra*, Boeken was unsuccessful in quitting for more than a few weeks — even though he beat his addictions to both heroin and alcohol. RT 1977-91, 2321-26, 3327-30; CT 13558-59.

Although Boeken was aware of a controversy over whether smoking was dangerous and knew the government had required that warnings be put on cigarette packs, he did not credit these health-related allegations and regarded them as political in nature. CT 13540-42. He knew the tobacco companies regularly contested these allegations and he believed the tobacco companies; he did not believe the executives of such major corporations would lie. CT 13542-50, 13561. A top PM executive testified that it was not unreasonable for consumers to respect and believe its executives. RT 4492-93.

In 1967, relatively early into his addiction to nicotine, on his first quit attempt Boeken managed to stop smoking for several weeks at the insistence of a girlfriend. RT 2322-23. If in the 1960s PM had disclosed to Boeken what it knew about the dangers of its cigarettes, Boeken would have stopped smoking, CT 13564-64A, thus avoiding any serious risk of lung cancer. RT 1414, 1456, 2446-47. Instead, Boeken continued smoking.

In 1999 Boeken was diagnosed with lung cancer caused by the Marlboro cigarettes, and filed this lawsuit. CT 1-66. After a painful two-year battle against the disease, see RT 3344-50, 3353-58, he died on January 16, 2002.

7. Philip Morris's Profits From Its Fraud Scheme

In 1954, PM widely publicized its promise that "people's health" was its "basic responsibility, paramount to every other consideration in our business." Ex. 363; see also p. 8, *supra*. Later that year a top executive for PM reinforced

and elaborated on this promise by publicly stating in a major address: "If we had any thought or knowledge that in any way we were selling a product harmful to consumers, we would stop business tomorrow." Ex. 2340 at 3; RT 4276-77. *See also* Ex. 9347 at 2 (similar 1953 statement) ("I need hardly say that no person in Philip Morris . . . would engage in the manufacture or sale of cigarettes if we believed there was a sound basis to the statements being currently publicized.").

PM did not keep its promises to the public. Instead of voluntarily stopping business PM pursued the fraud scheme. Instead of, at minimum, disclosing it knew its cigarettes were deadly and addictive (thereby likely forcing it out of business through a combination of consumer choice, litigation, and regulation), PM pursued the fraud scheme. The sums PM was able to collect on account of its fraud scheme are staggering: from 1954 through 2000 PM earned a total of at least \$96.57 billion (in 2000 dollars) on account of its tobacco business, even though it paid out about half of these profits in dividends each year rather than reinvesting them to earn greater profits in the future. CT 13496-97, 13533-34.

B. Proceedings Below

1. Argument to the Jury on Punitive Damages

The argument to the jury on punitive damages focused on the above evidence of how PM carried out, over decades, an official corporate policy to defraud consumers, including Boeken. (For a complete transcript of the closing argument of Boeken's counsel see the Appendix ("App."), *infra*, at App. 1a-177a). *E.g.*, App. 128a-131a (focusing on fraud on threshold issue of PM's liability for punitive damages).

The design defect claim was addressed only briefly by counsel for Boeken, App. 105a, 117a, 170a-171a, and by counsel for PM, RT 6089-97, 6164-74, with no suggestion punitive damages were being sought based on design defect.

As to Marlboro Lights in particular, at trial Boeken abandoned any theory based on failure to warn after June

30, 1969, that Marlboro Lights (first marketed in 1971, see PM Pet. at 6 n.2) were as dangerous as regular cigarettes. Before the closing argument, Boeken's counsel informed the trial judge:

Before 1969, warnings are absolutely 100 percent fair game. Period. Failure to warn, . . . failure to instruct them on how to use a light cigarette. And before July 1, 1969, it's absolutely fair game, and I won't give up one day of that. I'll argue right up until midnight of June 30th, 1969. . . . After June 1969, your Honor, I'm going to stay away from warnings. . . . I may be being overly cautious here, but that's my choice, and I have chosen that — on the failure to instruct regarding light cigarettes, I'm going to go with the cutoff of July 1, 1969 on that.

RT 5795-96.

Accordingly, Boeken's counsel stated in closing argument that he was faulting PM for failing to instruct on the proper use of "light" cigarettes before July 1, 1969 (a period involving no preemption issue).² Counsel for PM likewise

² App. 59a ("up until July 1, 1969, Philip Morris had a duty to warn people who bought light cigarettes that, guess what, you're buying these low-tar cigarettes, you think you're going to get less tar, you think you're going to get less of the bad stuff, you think you've got less of a chance to get sick. Wrong, wrong, wrong. After 1969, no such duty claimed in this case."); App. 97a-98a ("[S]houldn't the consumers have been told when these things came out, when they came out in the '60s, shouldn't the consumers have been told, hey, if you are going to use these things, watch where you put your hands. If you are going to use these things, don't puff so deeply. *** And it doesn't matter, in this case, that Mr. Boeken didn't start using these things until the '70's, because if that information had been put out, . . . at least everyone would have known what they were doing when they bought these things."); App. 171a ("Consumer expectations is therefore light cigarettes. Would an ordinary consumer believe, since the 1950's, that light cigarettes are better for them, and obviously the answer is yes. And do the manufacturers and the government know the whole time that it was phony? And obviously, the answer is yes. . . . We are talking 1950's here. Now, this warning issue what should have been wa[rn]ed about, what instructions should

stated that the case did not involve any claimed failure by PM to instruct smokers on how to smoke Marlboro Lights.³

Boeken's case focused instead on the fraud counts. "The major thrust of this case is fraud," the jury was told. App. 10a. *E.g.*, App. 56a ("There are about four or five or six different kinds of fraud that are claimed in this case."); App. 62a ("[E]very one of these things has to do with fraud. The subject matter is fraud."); App. 130a-131a ("[Y]esterday I flashed about five or six of these fraud jury instructions . .

have been given, telling people don't puff so deeply, don't take too much puffs, don't cover up those holes, that's fair game until July 1, 1969. So that's the consumer expectation sheet.").

³ Counsel for PM stated, at RT 6157, 6160:

. . . I do want to say one more thing about low tar. Because one of the legal claims in the case is that Philip Morris should have warned smokers before 1969, which is that legal cut-off date you have heard reference to in the plaintiff's argument that Philip Morris should have warned smokers before 1969 about how to smoke low tar cigarettes and the failure to do that gave consumers some misimpression or created some harm. Okay.

Now, remember, because we are talking about pre-1969, pre-1969, before July 1st, 1969, we are not talking about Marlboro Lights, which came on the market later.

We are not talking about Merits and other cigarettes that came on the market later.

We are talking about that first group of low tar cigarettes.

* * *

. . . [W]hat does this issue have to do with Mr. Boeken? When did Mr. Boeken switch to low tar cigarettes?

When would he potentially have run into a problem from some pre-1969 failure to warn about what to do with these cigarettes?

Mr. Boeken's testimony:

"Q: You started smoking Marlboro Reds; right? How long did you smoke? You didn't star[t] smoking, I assumed, Marlboro Reds, but from the time you smoke[d] Marlboro Reds, how long did you smoke those cigarettes?

"A: Until about 1981, '82, '81, '82, somewhere right there."

* * *

. . . [F]raud, basically is saying one thing and you know it's not true, you are saying one thing when you got no reason to say it, because you suspect it's not true, or saying something to lure someone in. The fraud is basically creating doubt about the health charge without actually denying it. That's all of these kinds of fraud in a nutshell."); App. 164a ("So this case goes to the jury, goes to you, ladies and gentlemen, on, I think, six different theories. Except for two, they are all different kinds of fraud. . . . [T]he bottom line to all those instructions, I couldn't do it any better than [defense counsel] did this morning, . . . Philip Morris must have made a representation to fool people. And, gee, haven't they admitted it, don't all these documents admit it?"). See also App. 62a, 69a-70a, 138a-139a, 147a-148a, 170a.

At the heart of the fraud, Boeken's counsel argued, was PM's fraudulent promise at the outset of the conspiracy in 1954 (reiterated by PM's top executive as late as 1998, RT 5900), that the health of consumers was its paramount concern. *E.g.*, App. 11a ("here's the promise, people's health is paramount to every other consideration in our business. . . . [W]hen they said we accept that, that's a lie. It was a lie on the day it was printed."); App. 13a ("[I]n 1954 . . . here's the promise: 'If we had any thought or knowledge that in any way we were selling a product harmful to consumers, we would stop business tomorrow.' . . . There was never a chance in heck that that promise would be kept, it is an absolute, total lie.").

The closing argument juxtaposed this promise with an analysis of PM's conduct in various areas over the years. Four examples illustrate the fraud theme.

First, it was emphasized to the jury that even though PM's own expert testified it was clear by 1964 that smoking causes lung cancer, PM waited 35 years to admit it, until 1999, App. 9a-10a, 92a-93a, far too late to aid Boeken. App. 72a, 91a-92a. The admission was not prompted by anything new in science or medicine. App. 92a. It came only because PM and its coconspirators, as a result of lawsuits brought by state attorneys general, "got cornered, put in a corner from which they couldn't escape, and put up their hands and surrendered" App. 72a; see also App. 22a, 26a-27a.

The PM files uncovered by that litigation included "extraordinarily disturbing documents . . . that talk about the lawyers running the science. Instead of using science to try to stop from killing people, the lawyers prevent the science to try to stop from losing cases. People's lives versus litigation." App. 166a. PM's top scientists recognized as early as 1969 that the litigation strategy of denial, which would last another 30 years, was barring "vital" research, and Boeken's counsel cited this evidence in urging: "Stuff like this is so far off the chart, this should never, ever, be allowed to happen again. Forget the tobacco industry. Any industry, any time." App. 53a, 167a.

Second, it was emphasized to the jury that the ultimate result of PM's decades of indefensible delay in admitting the dangers of its product was "the largest animal experiment ever done, but in this test, rabbits weren't used, mice weren't used, rats weren't used, people were used." App. 94a. In vivid illustration of the fact that for decades Boeken and many other consumers were fraudulently treated as human guinea pigs, who without informed consent used a dangerous drug-delivery device provided by PM, the jury was reminded of testimony by a PM scientist that after it finally "admitted that its product causes cancer, . . . [PM] decided that it was going to test a Marlboro cigarette to find out what in it causes cancer" and "signed up some volunteers. And Philip Morris has had these people sign waivers and contracts because this is such a dangerous undertaking." App. 38a-39a.

The contrast with PM's past disregard for consumers is a sharp one, as was pointed out to the jury. *E.g.*, App. 94a-95a ("Dr. Carchman . . . says, yeah, now that we are testing this stuff, we have got to get people to sign off in advance. Well, . . . what about the . . . 60 million American men that were smoking this stuff, they didn't get anyone to sign off in advance. . . . It boggles the mind . . ."); App. 141a ("Philip Morris, think about it, in our consumer society, the finished product that goes into people's bodies, has never been tested, . . . they purposely never tested it until sometime in the last year. And now after having 60 percent of the American male population smoking cigarettes at one time . . . now

when they do a test on the cigarettes, they got to get someone's signature to say, I understand that this stuff can really honest to god kill me. . . . [T]he largest animal experimentation ever done in history with a consumer product, the animal that was chosen for the experiment was us. And that's disgusting.").

Third, it was emphasized to the jury that rather than admit its wrongdoing, PM put on testimony from one of its executives who sought to downplay its past fraudulent activities, and who professed a concern about not marketing cigarettes to children which was at odds with the evidence and simply not credible — so there was no indication PM had acknowledged its past wrongdoing and had genuinely reformed. *E.g.*, App. 172a ("Ms. Merlo came in here, basically, says, you know what, we didn't really disagree with the Surgeon General, we sort of kept our mouth shut, we sort of kept to ourselves. And for me, that's the cover up of the cover up. . . . Now that it's all unwound, they are going to pretend it never happened. Well, we didn't really disagree with the Surgeon General. We were just sort of quiet. Well, we sort of kept to ourselves. Well, b[a]lloney."); App. 51a-52a ("No kids; no smoking. No smoking; no profits. Ellen Merlo saying, we will stop selling to kids and targeting kids is like that guy in 1954 saying, if this product is harmful, we'll stop, we'll g[e]t out of the business. It's like Bible saying in 1998 in Minnesota under oath, if he thought one person died from this . . . we'd be out of business. We'll stop business. That's ridiculous. It's an insult to the intelligence of anyone.")

Fourth, it was emphasized to the jury that PM had refused to apologize for or accept *any* responsibility for the harm suffered by Boeken as a result of its fraud. App. 1a-2a, 137a; *e.g.*, RT 6192 (PM's closing argument) ("Philip Morris is not legally responsible for Mr. Boeken's smoking or for Mr. Boeken's injury."). Indeed, the jury was reminded, PM put on an expert witness who testified, in effect, that "anyone who would listen to tobacco industry executives are fools" — "you can't trust them, you shouldn't trust them; if you trust them, you're a fool. What a defense. We're such snakes that if you trust us, you're a fool." App. 57a-58a. *See*

also App. 101a-102a, 104a ("Now, Mr. Boeken was reassured by them, again and again and again that they didn't know this was dangerous. They didn't think it was dangerous. Here is an open question, medical research was open, doctors disagree, scientists disagree, it could be the tar, it could be the cars, it could be the air pollution, it could be the stress, it could be the genes, it could be something about you, we don't know this for sure. . . . [A]nd Professor Cobbs Hoffman says, anyone that trusted those guys are stupid. . . . I hope, truly, that it hasn't come to that, that we can't trust anything that anyone says about anything any time, any place, anyhow."); App. 143a ("[W]hat they did was they spent money to put out a story that they knew was B.S. And they had the gall to come in here and say, Richard Boeken and 50 million Americans . . . should have known . . . when all of our Ph.D's and M.D.'s and geniuses are scratching their heads, saying we don't know what caused, we don't know what caused, it could be so many other things, don't you worry about it. That's hypocritical to the max."); App. 148a ("the incredible ultimate irony is, the ones that they succeeded in fooling, become mentally deficient, undeserving, liars, idiots. Their best customers, the ones who believed them, the ones who for[k]ed over the money. Aren't just disrespected, they are insulted.").

In argument to the jury regarding the level of punitive damages needed for adequate punishment and deterrence of wrongdoing such as PM's, counsel for Boeken focused on the massive profits which PM had received during the last several decades by breaking its promise that the health of consumers was its paramount responsibility, and that it would voluntarily shut down its business if its product proved harmful — illicit profits which were the sole motive for its fraud, so that punitive damages set high enough to remove at least a substantial fraction of the illicit profits are necessary for any hope of effective deterrence.⁴ Based on

⁴ *E.g.*, App. 10a ("How come it took Philip Morris 40 years to admit it? . . . The reason in the year 1999 or 2000, the reason was 5 billion."); App. 98a-99a ("[W]hat if they had told America, in 1955 or 1954

this deterrence rationale, counsel for Boeken suggested \$10.7 billion as an appropriate amount of punitive damages: two years' worth of the illicit profits received by PM through its actions which had been necessary to defraud Boeken.⁵

... this stuff will kill you, well, they wouldn't be in business today. We wouldn't be here today and Mr. Boeken would be going on about his business today along with about 15 million other people in this country."); App. 31a-32a ("Now, these people were afraid of lawsuits and ... because they were afraid their profits were going to go down the tubes, number 1, ... [t]hey put their heads in the sand, didn't want to know, tried not to know. Two, when that was over, they went out of their way purposely to deceive, to purposely deny things that were put out there. Three, when that part was over, then they started creating doubt, we won't actually deny, but will create as much doubt as we can."); App. 129a ("Philip Morris repeatedly lied to its customers, population, the Congress, Philip Morris disrespected everything there was except for one thing, which is the bottom line. ... And when the choice came between money and death, it was money. ... And when the choice came between money and the rights of others, it was money."); App. 146a-147a ("This case is about Philip Morris's choice. This case is about the tobacco industry's choice, and 1954, to do the right thing, and cost themselves a ton of money, or make a ton of money at the total disrespect of human life, their consumers, the government and our society. ... They had a choice, and they chose money.").

⁵ The argument concluded as follows:

The only thing these guys care about, the only thing these guys respect, is their profit. And it says so right in that document that you are going to have, that's highlighted in pink. That's all they care about is their profit.

* * *

How do you say to any manufacturer out there of anything that if they ever do anything like this remotely close to this again, that it can't conceivably be tolerated? Well, there's only one way it can be accomplished judicially, money. Punitive and exemplary damages. And there's only one thing that they care about, admittedly, money. And so it's got to hurt. A slap on the wrist is a joke. * * * 100 million dollars punitive and exemplary damage award here is taking my kid's allowance away for a week. Slap on the wrist. * * * The profits of Philip Morris, ... 5.35 billion dollars in 2000. ... If there was a way that I could say to you, put a stake through its heart, kill it, I would, dead. But I can't. It's not the law. There's no civil death penalty, that cannot be done. ... That emblem out there where some of you jurors have sat at one time or

2. The Jury's Verdict

On June 6, 2001, the jury returned a verdict in favor of Boeken for \$5.54 million in compensatory damages and \$3 billion in punitive damages. RT 6440-42; CT 14839-41.

3. The Trial Court's Remittitur Order

In its posttrial motions PM moved for a new trial or, in the alternative, for a substantial remittitur of the amount of punitive damages. CT 10378-79, 10520-53. Boeken argued there was no basis for a new trial, or even a remittitur, as to punitive damages. CT 13463-13512.

In its posttrial order regarding punitive damages, PM Pet. App. 156a-168a, 180a-181a, the trial court analyzed the reprehensibility of PM's fraud scheme, PM Pet. App. 157a-161a, concluding: "Philip Morris's conduct was in fact reprehensible in every sense of the word, both legal and moral," PM Pet. App. 161a — "utterly reprehensible," with "devastating and widespread consequences . . ." PM Pet. App. 164a.

The jury's \$3 billion punitive damages verdict was a fraction of the illicit profits from PM's reprehensible fraud scheme, and thus in itself only a small step toward deterring such misconduct in the future. Even so, the trial court reduced the award as "excessive as a matter of law" under California law, PM Pet. App. 156a, based on an analysis of the "legally appropriate punitive-to-compensatory ratio." PM Pet. App. 161a. Based on its analysis of the California law "ratio" test, the trial court held that "a ratio of approximately 20-to-1 is appropriate in this particular circumstance," and accordingly conditionally granted the motion for a new trial unless Boeken elected a reduction of the punitive damages award to \$100 million. PM Pet. App.

another, . . . lady justice doesn't have a piece of paper. And she doesn't have a tooth pick. . . . She's got a sword. Now, I say, two years profits, and I am not joking.

App. 172a, 175a-177a.

167a-168a, 181a. Boeken elected a reduced punitive damages award. CT 14837-41.

4. The Court of Appeal's Decision

PM filed its notice of appeal, after which Boeken filed a notice of cross-appeal limited to challenging the trial court's reduction of the punitive damages award, as authorized by Cal. Code Civ. P. § 904.1(a)(4) and *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 918 n.1 (1978).

On appeal, PM urged the punitive damages be further reduced, to bear a 1-to-1 ratio to the compensatory damages. PM Reply Br. at 73-80. In its argument PM cited with approval a federal district court decision suggesting in dicta that under *State Farm* a single-digit cap would apply even in a lawsuit against Osama bin Laden for intentionally causing the deaths of 3,000 people on 9/11. *Id.* at 80 (citing *Smith ex rel. Smith v. Islamic Emirate of Afghanistan*, 262 F.Supp.2d 217, 239-40 n.37 (S.D.N.Y. 2003)).

The Court of Appeal agreed with the trial court that the fraud scheme under which PM intentionally injured Boeken was in every sense of the word reprehensible. PM Pet. App. 3a-12a, 16a-25a, 59a-65a. Yet it ordered the punitive damages award reduced still further, to \$50 million, so it would bear roughly a 9-to-1 ratio to the \$5.54 million compensatory damages award. Despite all the evidence of PM's reprehensible, profitable, and long-running fraud scheme, the Court of Appeal held that only a 9-to-1 ratio was permitted by due process. PM Pet. App. 65a-68a, 71a-78a.

The judgment of the trial court was affirmed, as modified, conditioned on Boeken electing a reduced punitive damages award in lieu of a new trial, PM Pet. App. 77a-78a, which Boeken subsequently did. On August 10, 2005, the California Supreme Court denied PM's and Boeken's timely filed petitions for review. PM Pet. App. 182a. On November 8, 2005, petitions for certiorari were filed in this Court by PM (No. 05-594) and Boeken (No. 05-600).

ARGUMENT

Boeken agrees that review of the punitive damages judgment is warranted, and indeed Boeken affirmatively urges review for the reasons set forth in Boeken's separate petition for certiorari (No. 05-600).

Boeken does not oppose a grant of review of the preemption issue, in the event this issue, in the view of the Court, adds to the certworthiness of the case as a whole. However, even assuming the preemption issue is certworthy in abstract, possible flaws in the petition's references to the record, if material, may cut against review.

I. REVIEW OF THE PUNITIVE DAMAGES JUDGMENT IS WARRANTED BECAUSE THE LOWER COURTS ARE IN CONFLICT OVER THE PROPER APPLICATION OF THE DUE PROCESS "RATIO" GUIDEPOST AND RELATED PRINCIPLES

For the reasons set forth in Boeken's separate petition for certiorari (No. 05-600), Boeken agrees this Court should grant review of the punitive damages judgment to address the important conflicts among the lower courts as to the proper application of the due process framework for "gross excessiveness" review of punitive damages in the aftermath of this Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).⁶

⁶ Two caveats are in order. First, as summarized on page 1, *supra*, Boeken respectfully suggests that instead of granting review on Question 2 in PM's petition, before granting review of the punitive damages judgment this Court should rephrase the question along the more general and neutral lines set forth on page i, *supra*.

Second, while agreeing that the punitive damages judgment merits review, Boeken disagrees with PM's suggestion that the Court of Appeal "relied heavily on harms to non-parties that bear no reasonable nexus to the conduct at issue in this single-plaintiff case." Pet. at 12. This case presents nothing even remotely like the "nexus" issue involved in *State Farm*, in which this Court emphasized that in upholding the punitive damages in that case the Utah courts had relied extensively on

Several lower court decisions interpreting and applying the *State Farm* "ratio" guidepost handed down in the last three months since the parties filed their petitions further highlight the conflict in the lower courts.

For example, contrary to the lower court decisions cited by PM which reserve a 9-to-1 ratio only for cases involving the most reprehensible wrongdoing (and even then only where the compensatory damages are modest), at least four lower court decisions during this time period have upheld ratios of 9-to-1 or higher in cases not involving exceptional reprehensibility, rejecting the view that such ratios are reserved only for the rare case. *Action Marine, Inc. v. Continental Carbon, Inc.*, 2006 WL 173653, *5-*9 (M.D. Ala. Jan. 23, 2006) (business tort case; \$17.5 million in punitive damages upheld in full on roughly \$1.9 million in compensatory damages, for roughly 9-to-1 ratio); *Superior Federal Bank v. Jones & Mackey Construction Co., LLC*, 2005 WL 3307074 (Ark. App. Dec. 7, 2005) (business defamation case; roughly \$3 million in punitive damages upheld on \$175,000 in compensatory damages for defamation, for roughly 17-to-1 ratio); *Krysa v. Payne*, 176 S.W.3d 150, 155-63 (Mo. App. 2005) (fraud case involving sale of used vehicle; \$500,000 in punitive damages upheld on \$18,449 in compensatory damages, for roughly 27-to-1 ratio); *Johnson v. Ford Motor Co.*, 135 Cal.App.4th 137, 147-

a wide range of activities by State Farm nationwide, many of them apparently lawful, and some involving lines of insurance (e.g., earthquake, hurricane) having essentially nothing to do with State Farm's isolated defense of a lawsuit against Mr. Campbell arising from an auto accident in Utah. *State Farm*, 538 U.S. at 420-24. In this case, the Court of Appeal carefully considered and rejected State Farm's "nexus" argument, PM Pet. App. 64a-65a, in analysis PM fails to address. See also pp. 2-21, *supra* (describing the wide range of evidence and argument in this case and its relevance to the jury's task in setting punitive damages). However, PM's suggestion that the court below violated the "nexus" requirement is a minor aspect of its petition, and the absence of support in the record for PM's suggestion does not affect the certiorariworthiness of the central legal issue presented by the petition regarding the "ratio" guidepost, an issue on which the lower courts clearly are in conflict.

50 (2005) (recent decision on remand following post-*State Farm* California Supreme Court decision in fraud case involving auto manufacturer's circumvention of "lemon law"; \$175,000 in punitive damages upheld on \$17,811 in compensatory damages, for roughly 10-to-1 ratio).

Supporting PM's observation that some lower courts employ a presumption that any single-digit ratio comports with due process is the decision in *Day v. Ingle's Markets, Inc.*, 2006 WL 239290, *15 (E.D. Tenn. 2006), a malicious prosecution case upholding \$2.5 million in punitive damages on \$500,000 in compensatory damages, a 5-to-1 ratio.

Contrary to PM's claim that a 1-to-1 ratio may well be the maximum in a case involving "substantial" compensatory damages, no matter how reprehensible the facts, is the Oregon Supreme Court's decision in *Williams v. Philip Morris Inc.*, 2006 WL 242456 (Or. Feb. 2, 2006) (fraud case brought by individual smoker; upholding \$79.5 million in punitive damages bearing a 97-to-1 ratio to the compensatory damages awarded by the jury, and a 152-to-1 ratio to the compensatory damages allowed under a damages cap). That court's approach to the "ratio" guidepost sharply conflicts both with the decision of the Court of Appeal below and with an Eighth Circuit decision in a tobacco case a year ago, *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (reducing \$15 million punitive damages award to \$5 million, to bear roughly 1-to-1 ratio to the \$4.025 million in compensatory damages) (discussed in PM Pet. at 12-14; Boeken Pet. at 23).

The Eighth Circuit's approach, in turn, is supported by a recent divided decision of the Sixth Circuit imposing either a 1-to-1 or a 2-to-1 ratio in a case involving reprehensible facts and the death of the victim, in which the punitive damages were slashed from \$3 million to \$471,258.26. *Clark v. Chrysler Corp.*, 2006 WL 229506 (6th Cir. Feb. 1, 2006). This is the same court which a few months earlier upheld in full a *larger* punitive damages award — \$600,000 — for a casino's extremely rude treatment of a customer, even though the award bore a 2,150-to-1 ratio to the compensatory damage. *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629 (6th Cir. 2005), *reh'g en banc denied*

(Feb. 6, 2006) (discussed in Boeken Pet. at 25).

A microcosm of the disarray among the lower courts is found in the three opinions rendered in *Clark*. In *Clark* the jury awarded \$471,258.26 in compensatory damages for the death of the husband of plaintiff Dorothy Clark. It allocated 50% comparative fault to defendant Chrysler due to the grossly defective Chrysler vehicle Mr. Clark had been driving, and 50% of the fault to Mr. Clark, who had caused the accident and had not been wearing his seatbelt. One judge held that the sum of *exactly* \$471,258.26 was the maximum amount of punitive damages permitted by due process, reasoning that due process shielded Chrysler from paying more than double its \$235,629.13 payment of compensatory damages for Mr. Clark's death (after the 50% deduction for Mr. Clark's own fault). 2006 WL 229506 at *9 & n.16 (opinion of the court) (per Restani, C.J., U.S. Court of International Trade, sitting by designation).

Another judge disagreed with this 2-to-1 ratio, concluding that a 1-to-1 ratio was the maximum permitted by due process because the compensatory damages were "substantial" within the meaning of *State Farm*. *Id.* at *14 (Kennedy, J., concurring in part and concurring in the judgment) (quoting 523 U.S. at 425). However, this judge reasoned the full \$471,258.26 should be used as the denominator of the ratio because "the punitive damages award should not be reduced by the comparative fault of Mr. Clark." *Id.* at *14-*15. Although this judge applied the "ratio" guidepost differently than did the first judge, both judges reached the same destination: *exactly* \$471,258.26 (to the penny) was held to be the maximum punitive damages figure permitted by due process. *Id.* at *15.

The third judge saw no due process problem with the jury's \$3 million punitive damages verdict (involving a ratio of either 6.4 to 1 or 13 to 1, depending on the denominator), especially given the punitive damages decisions of this Court authorizing higher-than-usual ratios where reprehensible misconduct has resulted in death. *Id.* at *15-*26 (Moore, J., concurring in part and dissenting in part).

The majority decision in *Clark* contrasts sharply with Justice Kennedy's observation more than a decade ago that

"[t]he Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive damages" *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 467 (1993) (Kennedy, J., concurring in part and concurring in the judgment). The three *Clark* opinions, viewed against the backdrop of other recent lower court decisions, tend to support the conclusion that this Court's punitive damages jurisprudence, at least as articulated to date, is "insusceptible of principled application" and "does nothing at all except confer an artificial air of doctrinal analysis upon [an] essential ad hoc determination that [a] particular award of punitive damages was not 'fair.'" *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599, 606 (1996) (Scalia, J., joined by Thomas, J., dissenting). See also *id.* at 607, 613 n.5 (Ginsburg, J., joined by Rehnquist, C.J., dissenting) ("The exercise is engaging, but ultimately tells us only this: too big will be judged unfair.").

Clark's arbitrary, ad hoc reduction of a punitive damages award, and its lack of deference to the jury's role in determining punitive damages, are characteristic of many lower court decisions in this area — decisions difficult to square with *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 n.4 (2001), and *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 n.10 (1994). Such decisions (including that of the Court of Appeal below) suggest the need for this Court to emphasize for the benefit of lower courts that the "fundamental guarantee" of due process review of punitive damages is to prevent "arbitrary or irrational deprivations of property," *TXO*, 509 U.S. at 467 (Kennedy, J., concurring in part and concurring in the judgment), not to permit routine judicial interference with jury verdicts which are rendered after fair trials. A concern with "arbitrary" punitive damages verdicts rendered after unfair trials was a central theme of the *State Farm* decision. Due process review of punitive damages should be limited to ensuring that punitive damages awards are "admeasured by standards or rules rather than in a completely ad hoc manner" — so that "[t]he judicial function is to police a range, not a point." *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676, 678 (7th Cir. 2003) (Posner, J.).

II. THE PREEMPTION ISSUE MAY BE AN ADDITIONAL ISSUE WORTHY OF REVIEW

Boeken does not oppose a grant of review on Question 1 concerning preemption of the "consumer expectations" product liability claim in the event this issue, in the view of the Court, adds to the certworthiness of the case as a whole. From the analysis of the general legal issue set forth in the petition (at 8-10) and in an *amicus* brief, there may be reasonable grounds for concluding that the lower courts are in substantial disagreement over the issue (although counsel for Boeken has not independently confirmed this analysis). Standing alone the preemption issue might not be worthy of plenary review, yet the issue still could supply an additional reason to grant review of the case as a whole.

However, even assuming the preemption issue is in abstract important enough to merit this Court's attention, review of it *in this case* might be unwarranted to the degree that three statements made in the petition (set out in the margin) turn out to lack support in the record, at least if any lack of support for these statements is material to the legal arguments PM would make if review were granted).⁷

⁷ The three statements are:

1. "Respondent argued at trial that petitioner Philip Morris USA (PM USA) should be held liable and punished for failing to give consumers a specific warning that the Marlboro Lights cigarettes he smoked were as dangerous as regular cigarettes." Pet. at 1.

2. "Thus, at trial, respondent had to argue, and did argue, that Marlboro Lights were defective in design because petitioner *failed to warn* smokers that those cigarettes may not actually deliver lower tar to a smoker who "compensates" for the cigarette's lower nicotine yield by "adjust[ing] the way he or she smokes in order to get a satisfying amount of nicotine * * *." Pet. at 5.

3. "In closing argument, respondent's counsel had to argue, and did argue, that petitioner's low-tar cigarettes defied consumers' expectations because petitioner *failed to warn* smokers not to "puff so deep, don't take to[o] much puffs, don't cover up those [ventilation] holes." Pet. at 5.

In possible conflict with Rules 14.1(g)(i) & 14.4, PM's petition lacks record citations on these three statements. Given the record summary on pages 2-21, *supra*, it is by no means apparent that these statements are supported by the record. Likewise, the Boeken appellate brief cited by PM (PM Pet. at 6) does not appear to describe the "product liability verdicts" at trial as having been "based on allegations" of a *failure to instruct* on the proper use of "light" cigarettes after 1969; instead, that brief appears to defend the jury's conclusion based on a *failure to design* cigarettes to meet consumer expectations, both before and after 1969. See App. 180a-182a. Absent a complete list of the record citations which PM contends support these three statements concerning what occurred at trial, a definitive analysis of PM's position is not possible, and thus counsel for Boeken do not hazard at this juncture a final conclusion on the matter. They do flag it as of possible concern.

CONCLUSION

For the foregoing reasons, Boeken agrees that review of the punitive damages judgment is warranted, and Boeken does not oppose a grant of review of the preemption issue, should it turn out that any flaws in the petition's references to the record are immaterial.

Respectfully submitted.

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February 13, 2006

APPENDIX CONTENTS

APPENDIX A:

Reporter's Daily Transcript of Plaintiff's Closing Argument	1a
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APPENDIX B:

Excerpt From Brief of Respondent and Cross-Appellant in <i>Boeken v. Philip Morris Incorporated</i> (Cal. Ct. Appeal, 2d Dist., Div. 4, No. B152959), filed April 1, 2003	178a
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APPENDIX A

PLAINTIFF'S CLOSING ARGUMENT

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

DEPARTMENT 308 HON. CHARLES MC COY, JUDGE

RICHARD BOEKEN,)	
)	
Plaintiff,)	
	)	CASE NO.
VS.	)	BC 226593
)	
PHILIP MORRIS)	
INCORPORATED,)	
A CORPORATION, et al.,)	
)	
Defendants.)	

**REPORTER'S DAILY
TRANSCRIPT OF PROCEEDINGS**

[5818]

★ ★ ★

THE COURT: . . . Is the plaintiff ready to address the jury?

MR. PIUZE: Yeah.

THE COURT: Thank you.

OPENING ARGUMENT

BY MR. PIUZE:

First, I apologize for getting a bunch of you sick.

Second, I want you to listen carefully during the arguments which I think will take more than a day. And

this case merits more than a day. And I want you to listen carefully so you can hear Philip Morris say, we are sorry we got Mr. Boeken sick.

And I apologize for getting you guys sick. And I call on them, over the course of the next day, day and a half, two days, to apologize for getting Mr. Boeken sick. [5819]

It was pretty obvious we are not stupid. It's pretty obvious what happened. There was a little company, there was a little industry, this industry didn't exist before 1920.

It's kind of hard for us to imagine, us who have grown up in a smoking environment, us who are in our 50's and we know that almost 60 percent of American men smoked when we were growing up, that's according to the defense last witness here, it's kind of hard for us to believe that this isn't the necessity of life, this isn't the centerpiece of life, this wasn't always around until 1920 or so.

There was none of this because there were no machines to make them. People got along perfectly well without this. The world can do without this.

Someday people are going to look back on the 20th century here, from about 1920 or so, maybe 1930, because this disease takes a lag time, it doesn't just happen, and going who knows how far it is going to go, maybe you will have something to say about how far it is going to go, but people are going to look back someday from maybe around 1930 or so into 2010 or 2030 and say, what was that all about? Because we lived for thousands and thousands and thousands of years without having [5820] these things, and I am sure we are going to live again without having these things.

This was, according to Ellen Merlo a relatively little company. And this built the largest consumer retail empire in the world.

This thing.

So it's real easy to know what happened here. What happened here is that some farmers grow tobacco, it's a dirt cheap operation, it's made into cigarettes, make a nice little profit, and it's a nice business.

Farmers make some money, and people in the factory make some money, and the shareholders make some money and the stockholders make some money. And it's a nice business.

Just like growing tomatoes, just like growing lettuce.

Except for one thing, after awhile, it became obvious to science and to medicine that this stuff killed people, made people really, really, really sick. It killed them. It killed them slowly, painfully.

And a decision had to be made. It's not the kind of decision that most of us are ever privy too. This is the kind of decision that gets made in a back room someplace. And the decision was, what's more important, money or health? [5821]

What's more important, money or life?

And we know what the answer is.

For — we will talk about it 50 years, 45 years, 30 years, depending on who you listen to, according to the defense's own witness, there was an overwhelming medical consensus, scientific consensus in 1964, this stuff causes cancer.

And they lied and lied and lied. And then after they warmed up, they lied some more and lied some more and lied some more.

And last year, they decided to stop lying. Do you think they decided to stop lying because they are good citizens now?

Do you think they decided to stop lying because they got put in a corner, finally, after all these years, a bunch of brave people from the public health, from the attorneys general, a bunch of brave people ran them down and put them in a corner where they couldn't escape and now they say, oh, yeah, okay, that's true, you know what, this stuff does cause lung cancer, this stuff does make people sick, sorry we were a little late in figuring it out.

What happened while they were screwing around with this? Two things. [5822]

Phenomenal wealth happened, and death and misery happened. Still happening. That's how easy this story is.

Now, this story wasn't so easy 15 years ago or 20 years ago or even five years ago.

But the story is so easy now, because here it is, it's all laid out. They got run down. They got cornered. The evidence got taken from them. And now that the evidence is out in the open for everyone to see, a new Philip Morris happened. We are a different company. We give to charity. We fund homeless shelters. We admit smoking causes lung cancer. We admit nicotine is addictive. We were just a little late in coming to that, and it just so happens that we figured it out at the time we got put up against the wall where we could never escape.

So here we are now and the question is, I guess, after — it's like when all these things I see on "Hill Street Blues" or one of these police dramas where the police say, look, tell us now what it is, confess now, don't make us work for it, we will cut you a deal, we will go to the D.A., we will cut you a deal. But if you make us run you down, if you make us get all the evidence, if you are going to deny this, we are going to throw the book at you. [5823]

Well, that's what happened. And that's where we are.

And when I am done here, I am going to ask you to throw the book at them.

Remember Dr. Hammer's textbook, Mr. Carlton says it was the heaviest book he ever saw. I want you to throw a carton of those books at them.

Right here, no kidding, look, right here, could be the single most important thing any one of us does outside of our personal lives, right here.

We heard from, I think, professor Cobbs Hoffman, she's the historian from San Diego. We heard that California leads the nation, when it comes to smoking, smoking reduction, smoking cessation. California passed proposition 99, taxed cigarettes, used the money from cigarettes to put on anti-smoking ads.

California was one of the first places to make it illegal to smoke in public buildings, to smoke in restaurants, to smoke in bars.

As a result, California smoking rate has gone way down faster than the nation. As a result, the death rate in California has gone way down faster than the nation.

Okay. California, it's time again [5824] to lead right here and right now.

And because what I am going to ask you to do in the end is extraordinary, I am going to thank you in advance for your patience, because I am going to take some time here and I am also going to thank you on behalf of Richard Boeken and Judy Boeken for all of the patience that you have exhibited throughout the trial and all of the attention you have exhibited throughout the trial.

Some of the stuff was kind of thick. And I know one day we read from some deposition all day long, a Dr. Mele, and another day a Dr. Uydess. And I am sorry we put you to sleep. I put you to sleep. But I truly, truly, on behalf of the Boeken's, appreciate the time and the energy and the thought you have devoted to this so far and that you are going to.

So here we go.

This is what Philip Morris told the press through its web site about what we were going to be doing hear. We started on March 19, this went up before March 19.

And what this said is, Mr. Boeken became a regular smoker in 1957, when he was about 13 years old.

Philip Morris will argue that there is substantial evidence that Mr. Boeken had long been aware of the potential health risks of smoking [5825] which were common knowledge throughout the community before he started smoking.

So let's stop there a second.

13-year-old kid starts smoking in 1957.

Philip Morris is going to argue that it was such common knowledge before 1957 that smoking was a health risk that Mr. Boeken should go home.

The company also contends it had no duty to warn Mr. Boeken of the risks that he already knew.

So let's keep that straight.

Mr. Boeken, 13 years old, should have known about the health risks of tobacco in 1957. Remember that, please.

Now, there was a guy who came in here, I didn't call him, Dr. Ludmerer. Dr. Ludmerer is a historian. He is a medical historian.

Dr. Ludmerer came in here and gave us his, this is a theme I am going to touch on every once in awhile, his \$300,000 opinion.

And his \$300,000 opinion was that, from 1950, when a famous British medical team first stated the risks of smoking being absolutely the cause of lung cancer, up until the very tiny end of the year 2000 when Philip Morris finally figured it [5826] out and admitted it, over that 50-year span, by early January, 1964, that's when there was a consensus that cigarette smoking was the major cause of lung cancer.

So let me ask a really stupid question.

How in the world was this 13-year-old kid supposed to figure out about the health risks of smoking in 1957 when there was no consensus in the scientific community until January of 1964 that there was any connection?

How does that work?

So I think that's a stupid question.

How is it that people, human beings, regular consumers, people with high school educations, people with less than high school educations, were supposed to know about all of the health risks of smoking when the scientists that worked for Philip Morris and the expert witnesses that have been paid by Philip Morris, and the public relation people that work for Philip Morris, and all the king's horses and all the king's men couldn't figure it out? How is that possible?

Throughout this trial, I hear a Dr. Cobbs Hoffman say everyone in the world knew, except the tobacco executives and their scientists and their spokespeople, and I hear another Philip[5827]Morris witness say, well, gee whiz, we were conducting all this great research and we were trying to run it down and trying to find out what it was and we

never could.

And I am trying to figure out how is it that my guy, Richard Boeken, 13 years old, was supposed to know all this stuff like Philip Morris tells you, when their own best scientists could never figure it out?

And I guess that's a stupid question.

Here's when I think, here's what I think the evidence shows about when science and medicine and the corporations that manufacture the product should have known.

My first witness, Mr. Boeken's first witness, was Dr. Doll.

And I was sort of in the fog of flu[] while it was going on so I took the liberty of going back and reading a little bit of Dr. Doll's testimony and I just wanted to remind you of a couple of things, if I could.

Royal medal from the Royal Society in Great Britain. Gold medal, British Medical Association. Presidential award, New York Academy of Science. United nation's award for cancer research. The queen made him a knight in 1971. In 1996 he received the Companion of Honor award, [5828] which is the highest, second highest honor anyone in the British empire can get, there's 65 people in the British empire that have that award.

Our first witness is one of them.

So Sir Richard Doll, Dr. Doll, is literally, truly, a giant of medicine in the 20th century.

And if you want to listen to some of the things Dr. Ludmerer, Philip Morris's medical historian said, he actually thought that the epidemiological model that Dr. Doll and Dr. Hill and Dr. Wynder and graham in the United States made will historically be a more important thing than the linking of cigarettes and lung cancer.

Now, I have got no clue if that's going to be right or not, but just think about it, their medical historian says the plaintiff's first witness here did such phenomenal work that it will go down as more important than the link between smoking and lung cancer.

So here's what Dr. Doll had to tell us. In 1950, in the United States, Doctors Wynder and Graham published a study which showed that there was a stupendous correlation between smoking and lung cancer. Something that couldn't be overlooked.

In 1950, Dr. Hill and Dr. Doll, in [5829] England, came up with exactly the same finding.

It couldn't be overlooked that smoking caused lung cancer.

When Dr. Doll started this study, he was a smoker. When Dr. Doll started this study, he didn't think that smoking was going to be linked to lung cancer. When Dr. Doll started this study, he thought the tar on the road might be linked to lung cancer.

But when Dr. Doll was done in 1950, they published in the British Medical Journal "smoking causes lung cancer."

Let me stop for a second just to digress a bit and remind us all of something.

The foremost prestigious medical journals in the world are the "British Medical Journal" in England, the "Lancet" in England and the "New England Journal of Medicine in America," and JAMA, "Journal of American Medical Association in America."

Some of the witnesses that have been called here, and I am thinking specifically of Dr. Doll and Dr. Benowitz, they should have visiting offices over in those places, they published so much world class, first rate, unbelievable stuff.

Some of the witnesses here, if there's — if the highest ranking is major league, [5830] well, these guys are in the hall of fame, the best there are any place.

And I don't mean to belittle some of my other witnesses who I didn't mention, but those two, their contributions to science, their stature in science is absolutely, there is no way.

By 1954, by 1954, Dr. Doll had told us that the American Cancer Society had done a study and he had done his doctors' study and Wynder and Graham had done more studies. And by 1954, it was stated tobacco tars are carcinogenic when applied to the skin of mice.

And in 1954, there was overwhelming evidence in the scientific and medical community about what caused cancer. But Dr. Doll said, that's not when people really should have known, people, meaning scientists, not Mr. Boeken, not me, not you, scientists.

Because there were skeptics, there were people who doubted it.

And Dr. Doll gave as the date, 1960. And the reason he gave 1960 was that in 1960, the world health organization, at that time, the world health organization said, smoking causes lung cancer.

Now, I'd just like to talk about two of my other witnesses here now, Dr. Strauss [5831] from Boston, from Harvard Medical School, from the Harvard School of Public Health, he's a public health official and an oncologist, and here's a man who I just slighted a few seconds ago by not mentioning, he's only written about 30 books or chapters in books. He's only got a hundred or so peer reviewed articles.

I mean, this guy is a superstar on his own right.

And so he came in and he said in his opinion, he's read every single article that's ever been written that he could find between — up until 1955.

And he said in his opinion, by 1955, the medical establishment and the scientific establishment knew that smoking caused lung cancer.

Dr. Feingold, another one of my witnesses, testified that in his view, in 1957, the medical and scientific establishment knew that smoking caused lung cancer.

So there's three of them, '55, Dr. Doll — excuse me — Dr. Strauss; '57, Dr. Feingold; '60, Dr. Doll.

Is it important to me exactly which of those is right? Not at all.

But I am just reminding you what these three witnesses said.

Dr. Ludmerer, from the defense, [5832] who's chart I held up a little while ago, as you know, said, yep, of course, I know of Dr. Doll, and of course I know what he has to say. And of course, by 1960, the band wagon had really gotten rolling and things were really going fast and I can't really

fault him for saying 1960 is the year, but I pick '64 when the Surgeon General put out the report.

So be it. I don't think it matters for the purpose of this case, except maybe when we come to talk about punitive and exemplary damages in this case.

But those are the dates. These are the people. Someplace between 1955, 1957, 1960 or according to the defense, \$300,000 witness, January '64 is when science and medicine had established an overwhelming consensus that smoking caused lung cancer.

So now the next question has to be that science and medicine have overwhelmingly established a link between smoking and lung cancer by someplace around '60. How come it took Philip Morris 40 years to admit it?

I have given you the answer in advance. The reason in the year 1999 or 2000, the reason was 5 billion.

Now, how did they avoid the obvious? How did they avoid, how could they [5833] possibly avoid coming forward and saying we know, we know.

Here's another history lesson.

On January 4th, 1954, in newspapers around the country, the tobacco industry announced the establishment of the tobacco industry research committee, T.I.R.C.

The members of the tobacco industry research committee are all down here (indicating).

And this case, part of this case is conspiracy. The judge is going to instruct you on conspiracy and I am going to probably read you one of the judge's jury instructions on conspiracy.

The major thrust of this case is fraud. And I am going to read you some of the instructions that the judge will give you on fraud.

But it started someplace before January 4, 1954.

Hers's a promise that Philip Morris made and here's a promise that the tobacco industry made and here's a promise that T.I.R.C. made.

"We accept an interest in people's health as a basic responsibility paramount to every other consideration in our business."

As they should.

As the manufacturers of firestone tire should. Bad tires, recall them, don't study [5834] them for 40 years, bring them in.

As the manufacturer of Tylenol should, someone adulterated some of your bottles, there's poison in some of those bottles, you don't know which ones, recall it, get it in. Don't leave it out there and say we are studying the situation.

As the manufacturers of Jalisco cheese should, got a bad batch of cheese that's making people really, really sick, don't study the situation, bring it back.

Because the health of the customer is paramount, truly, to every other consideration in the business.

So what are we talking about, Firestone tires, 150 families got killed; Tylenol, six, seven poor families that got someone killed, Jalisco, 30 or 40 poor families.

And they knew that the health of their customers was the paramount consideration in their business, even if they need a kick in the pants to know.

So here's the promise, people's health is paramount to every other consideration in our business.

Although that's a true statement, when they said we accept that, that's a lie.

It was a lie on the day it was printed. It was a lie ten years later, 20 years [5835] later, it's a lie today and it will be a lie next year.

We believe the products we make are not injurious to health. They knew better. They lied.

They continued to lie.

What if they weren't sure, what if the tobacco industry research council and the American Tobacco Company and Brown & Williamson tobacco company, and p. Lorillard company, and Philip Morris company, and RJ Reynolds company, and the United States tobacco company, what if

all of them really weren't sure yet, what if they really didn't know that their products were injurious to health? They thought that, gee, they may be. If we were taking any other consumer products in this country, think about it just for a second, toothpaste, gee, we got a bad batch of toothpaste, maybe it is hurting people, maybe it ain't hurting people, so what we will just do is sit back and find out whether or not it is hurting people.

That's not the way things run. If there is a chance it is hurting people, bring it back.

I believe that's a lie. I believe they knew then that the products —

THE COURT: counsel, your belief?

MR. PIUZE: excuse me. [5836]

THE COURT: Yes, Sir.

MR. PIUZE: I apologize.

My beliefs don't count.

The evidence that you have seen, and a little bit that you haven't seen yet, but I am going to show you, most certainly establish that at a minimum, they had no right to say that their products were not injurious to health.

And all of the evidence really says, they knew otherwise, contrary, directly. Last, we always have and always will cooperate closely with those whose task it is to safeguard the public health.

And as we go through some documents, we will see that that's not true either. Not only was there no cooperation, they made fun of public health officials. They went out of their way to cast doubt on public officials.

Their entire strategy was based upon creating false doubt in order to keep their customers.

And so in 1954, this is where we start, right here.

Philip Morris made a promise two months later.

Philip Morris's promise was, by George Weissman, the Vice-President, and he [5837] promised, you know, before I talk about what he promised, none of these big boards go into evidence. You won't see any of these.

What you will see is the small versions like this (indicating).

And the important stuff, whatever has been highlighted here, will be highlighted on the small versions.

But these big ones are gone.

I would just like to point out for this particular document, though, this is a speech this guy gave, there are his handwritten notes there and the speech was delivered for the public in 1954.

And here's the promise:

"If we had any thought or knowledge that in any way we were selling a product harmful to consumers, we would stop business tomorrow."

If they had any thought at all, I guess the scientists over at Philip Morris and the other tobacco companies could read, and I guess they had access to all of this stuff that piled up in 1950, 1951, 1952, 1953, if they didn't have any thought, where were they? On vacation?

So I believe that when this man said, if we have any thought or knowledge that our [5838] product was harmful to consumers, we would stop business tomorrow, is a flat out lie. There was never a chance in heck that that promise would be kept, it is an absolute, total lie.

And there's a reason, because if this promise was kept that was made in March of 1954, this promise, that was made in February, 1957, could not be kept.

This is Philip Morris's five-year research and development program. 1957.

"The basic objectives of Philip Morris are continuing to seek an increase in profits and improve long-range return on invested funds. These objectives can be achieved primarily through reduced operating costs, increased volume, increased profit per unit sale, and a combination of these elements."

So I am telling you what anyone would know, this cannot co-exist with this. Health, profits, they can't co-exist

the way this is set up.

Chose one, choose health, choose profits.

Let's see what was chosen.

Subjects to be avoided by Philip Morris research and development, 1980. [5839]

Subjects to be avoided are developing tests to find out if something causes cancer.

Oh, Oh, 30 years' worth of notice, Dr. Doll, 30 years' before said, tobacco causes cancer. 30 years later, Philip Morris says, let's avoid any kind of tests to figure out what causes cancer.

Oh, let's never attempt to relate human disease to smoking.

Son of a gun.

So this guy here in 1954, he promised to stop business tomorrow, stop business tomorrow if our products are harmful, his decedent over here decided to play ostrich. 30 years' worth of ostrich. Let's never try to figure out what causes cancer. Let's never try to figure out what causes cancer in humans. Let's never try to figure out what causes disease in humans.

I will tell you, it is inconceivable that these kinds of words could be written about any other product that I can imagine.

Food product, a drug product, a consumer product, anything that people inhale, eat, put on their skin, is tested up, down, in, out, backwards, forward, as Dr. Farone told you.

Automobiles, cribs, someone's high chair, one of their witnesses mentioned, if a [5840] complaint comes in, you look at it and you say, what's wrong with it, what am I going to do about it.

You don't deny it and lie about it. It's inconceivable that this kind of stuff could be said about any other product. It is a disgrace that this was allowed to go on as long as it did.

How long did it go on?

From this guy here, in 1954, your health is the most paramount thing in the whole world.

To this guy here who is going to shut down his business, if his product is harmful.

We get to this, and unfortunately, this isn't the end of where we get to. But in 1984, this is 20 years after Dr. Ludmerer, the defense expert, said there was a big time consensus in the medical and scientific fields that smoking caused lung cancer.

20 years later, the Tobacco Institute of which Philip Morris was a member, went to the United States Congress and gave them this document which you are going to have right here, and lied.

And the Tobacco Institute said, it is not known whether smoking has a role in the development of various diseases. A great deal more [5841] research is needed to uncover the causes and mechanisms involved in the onset of these diseases.

Remember what Dr. Carchman said when he was here the other day?

A lot more research is needed, they just started in the year 2000 to do research.

They just started testing Marlboro cigarettes in the year 2000.

They just started using human volunteers overseas to do this research in the year 2000.

1984, the tobacco industry.

The Tobacco Institute, Philip Morris is a member. This is conspiracy. This is fraud. The worldwide campaign being waged against cigarette smoking continues. There are calls in many countries for further restrictions on the growing manufacture, marketing and use of tobacco.

In the United States, bills to put stronger warning labels on cigarette packs are put before Congress.

Such proposals are based on the premise that there is sufficient evidence to prove cigarette smoking causes cancer or is a main cause of disease.

There is, 1984, Mr. Boeken, Mr. Boeken, should have known, before he started in 1957, remember, that's their position, that's their [5842] official position. Mr. Boeken should have known in 1957 when he was 13 years old before

he started smoking.

In 1984, they go to the United States Congress and say, there is a cigarette controversy, the causal theory that cigarette smoking causes or is the cause of various diseases which is reported to be related statistically is just that, a theory.

And at the end of their little paper to Congress, it says, in summary, these experts took the position that it is not scientifically possible to state that cigarette smoking causes lung cancer because of the apparent flaws and the basic epidemiology studies, the failure of animal studies to reproduce lung cancer in animals with whole smoke and the recent work that's been reported.

They still haven't done that. It is still impossible, nothing has changed.

They now admit, nothing has changed. There's no new science.

Dr. Hoshizaki said no new science. She said, you know what, I, as a biologist — and this is their \$80,000 witness — I, as a biologist, studying this, wondered, why do eight out of ten people who smoke not get cancer?

Why can't we produce human cancer [5843] in animals?

And I wondered about this and the C.T.R. Wondered about this and we still have never done that.

And so this controversy here, this controversy here, is anyone listening to this controversy?

Were there people out there who were addicted to smoke, who needed a reason, who needed something to hold onto, who needed a reason to believe what they were doing was okay, who needed a reason to say, you know what, maybe it ain't as bad as some people say. Well, that's what the tobacco controversy is all about, buying time, buying time. This is 1984.

And Mr. — I think we can see 1990, do you see that, on the causation of lung cancer, we will see a film.

(AT THIS TIME, THE VIDEO WAS PLAYED)

MR. PIUZE: Well, he didn't understand the question, see. And I don't think it is because he was dumb.

Dr. William Farone wasn't dumb either. [5844]

Dr. Farone was the second witness in this trial. It was a long, long time ago. So I'd like to remind you, please, I'd like to remind you about some of what Dr. Farone told you.

Because Dr. Farone is an insider.

Dr. Farone was one of the top guns over at Philip Morris research and development and he was one of the top guns there for eight years.

He had his own directorate and this little chart here that we saw recently. This is as of 1979. But just so we can get all the names straight when we go through these documents here, as of 1979, in the research and development department of Philip Morris in Richmond, Virginia, the two top guns were Seligman and Wakeham.

And then as we go down from Seligman and Wakeham, we have these directorates here, as they call them. And the directorates are development, and there's Dr. Gannon there; research, and there's Dr. Osdene there; applied research, there's Dr. Farone there; technical services, there's Dr. Thomson over there. So when we hear later on about Seligman and Wakeham, we are talking the top of the top of the top of the heap over here. And when we are talking about Osdene and Farone, we are talking about the next [5845] layer down. These are heavy duty, important, high-ranking scientists at Philip Morris.

Here's what Dr. Farone had to say to us a long time ago.

MR. LEITER: May I have a page number, please.

MR. PIUZE: Excuse me?

MR. LEITER: May I have a page number please. I am sorry.

MR. PIUZE: Sure. 1464.

MR. LEITER: Thank you.

MR. PIUZE: I have never used one of these machines so much in my entire life and I have tried a lot of cases. And I apologize that I am standing over at this machine so much and not standing with you. I think it is as important that you look at the words and more important when you look at

the words.

Forgive me. Here I go again. Okay. This is how we started off with Dr. Farone. He was the director of applied research. He was asked to learn as much as he could about cigarette and tobacco technology as he could. He learned everything from the ground up and then after a year, excuse me, and he did that so he could try to help make a product [5846] safer.

And for the next seven years, he supervised a wide range of different types of scientists working on cigarette technology. And here's the part where I want to start right here, but before I do, I'd like to remind you of a couple things.

This guy has been on "60 Minutes" a couple times. He's been on the Canadian Broadcasting System. He's been on the British broadcasting system. He's been a consultant to the F.D.A., Department of Justice and sever[al] other United States agencies for involvement in tobacco related issues over the course of the last five or six years for real.

This guy is the insider of Philip Morris.

This guy is the guy who, up until the year 2001, never charged a penny for any of his time in going around the country to testify or to help the government or to help CBS or "60 Minutes" or whatever, never charged a penny, until this year.

Why not?

He didn't charge a penny because in his words, he felt responsible for what has happened.

And since he's left that company in [5847] 1984, according to what he told you here, more people have died in this one country alone, preventable smoking-related illness than died in Hitler's Germany.

That's an astounding number. And he feels partially responsible. And so he has, up until this year, never charged, has gone around the country for free, to try to raise people's consciousness and try to get the word out about what really, honestly happened and what's going on.

In 1976, when you were at — the year we started, in 1976, when you were at Philip Morris, was it a secret there

among scientists that the cigarettes they were making caused lung cancer? No.

Remember when we just heard from the C.E.O. of that corporation, under oath, in front of Congress, in 1994, 18 years later?

In 1976, was it a secret among scientists there that cigarettes were addictive? No.

And we are going to talk about addiction later. But I know you remember, the same Mr. Campbell was one of those seven stooges who swore to tell the truth and when the microphone came down it was no — is it addictive, No, No, No, No, No, No, No, No.

[5848]

But in 1976, at Philip Morris, among the scientists there, it was not a secret.

You know what? Do we have a cross-check on that? This is one of my favorite exhibits in the whole trial.

Can we prove what Dr. Farone said is true at Philip Morris? Here, check this out.

This is February 19, 1969. So this is seven years before Dr. Farone got there.

And here's a memo. Look at what we are talking about. Wakeham, Dunn, this is called jet's money offer.

"I would be more cautious in using the pharmic-medical model — do we really want to t[o]ut cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls."

And so in 1969, these people who are top guns there know they are dealing drugs. And they are not dealing drugs like squib does or like Upjohn does or like Merk does, where they are regulated and there are people looking over their shoulders and testing all this stuff because they are drugs. They are dealing drugs with no [5849] oversight.

And I am going to say later, and I will say it now, the world's biggest drug dealer is something that puts the Columbian cartel to shame is Philip Morris. Has been.

"So Dr. Farone, in 1976, was it a secret among the scientists there that cigarettes were addictive?

"No, it wasn't.

"In 1976, when you started with the company, did you ever hear any scientist from Philip Morris ever say that he or she did not believe that the products, the cigarettes, caused cancer?

"Did not.

"Were you aware during the time that you were at Philip Morris that the public statements of the corporation for public dissemination were at odds with what the scientists employed by the company thought as far as the fact that its products caused lung cancer?

"Very much so."

Very much so.

1976, 1984, lies.

Between 1976, the year he started, [5850] and this year, just a coincidence, the year he left and the year this thing was put before Congress, that's an eight-year span, 400,000 people, times four, over three million dead people in this country from tobacco during that time that they lied about whether or not it was dangerous.

It's an amazing thing, it's — they say, so what? So what if we lied?

So what if we didn't figure it out right away?

So what are you going to do about it?

You can't do anything about it.

Mr. Bocken's tough luck. He should have known. He should have known when he was 13. He should have known when he was 13 years old.

But if he didn't, he should have known when he was 20.

He should have known when he was 30. He should have known when he was 40.

And if he should have known that, tough luck for him. It doesn't matter that we lied or cheated or were disgusting, tough luck for him.

And by the way, this last witness for Philip Morris, he said, I am going to adopt this part of what he said, I disagree with it for reasons that I will discuss later, but I am going to adopt it for now. Yeah, Mr. Boeken was just [5851] like five million other people or 10 million other people or 20 million other people or 40 million other people there are out there who are addicted to nicotine and who listened to this, he's no different than that.

If he really, really, really, wanted to quit, if he really, really, really, wanted to quit, he could have quit.

And you know what, I told you in opening statement, and I will say it again, if you put a gun to someone's head, you give them all the facts, if you threaten them, if you tell them, they can quit.

And I will tell you one other thing too now, Dr. Sam Hammar, pathologist, lung specialist, consultant to the World Health Organization, former professor, Dr. Feingold called him one of the top five lung pathologists in the world, said that this tumor that Mr. Boeken had which was diagnosed in October of the 1999, had been growing for ten years.

That it started ten years before.

And so that's uncontested testimony. By the way, all of the testimony in this trial about what kind of cancer Mr. Boeken had, adenocarcinoma, whether or not it was caused by tobacco smoking, it's all uncontested. There was no evidence presented here to the contrary. [5852] And if you are waiting, you waited in vain.

But this piece of uncontested testimony is important to remember, because Mr. Boeken, unfortunately for him, although he wasn't going to know it for ten years, he had it in 1989.

Because of the time it takes for cell division and cell division and duplication and on and on and all of these technical things that Dr. Hammar discussed, one and a half to two centimeter tumor that was discovered in October of 1999, started in 1989.

So I'd like you to keep that in mind as we go through some of these time lines here, please.

Back to Dr. Farone.

Judge, I have no clue about breaks or any other things.

THE COURT: 10:30.

MR. PIUZE: 10:30?

THE COURT: Yes, sir.

MR. PIUZE: Fine.

Back to Dr. Farone. You know, I am going to leave him sitting for a while.

When we talk with Dr. Farone here, it is going to be why all of the tests that existed on real products which Philip Morris denies ever occurring, why those tests were done in Germany, [5853] why those tests were done not on U.S. soil, what The Gentlemen's Agreement was, and why documents were regularly destroyed by Philip Morris.

But let's leave Dr. Farone for a while. I want to go on to a slightly different topic.

Is tobacco addictive?

This is another one of these revelations on behalf of Philip Morris. They figured it out just in time for this trial.

They figured it out just at the end of 2000, that tobacco was addictive. They figured out that tobacco was addictive at the same time they figured out that tobacco caused lung cancer.

But let's see what happened leading up to their revelation, please.

I have already told you about that "we make a drug, but let's not tell anyone about it" memo.

Here's something from September of 1980. This is a Philip Morris memorandum.

Part of this has been taken out. It doesn't matter. The part that stays is more important.

"The entire matter of addiction is the most potent weapon a prosecuting attorney can have in a [5854] lung cancer cigarette case. We cannot defend continued smoking as, 'free choice,' if the person was addicted."

Well, now, if Philip Morris thought, in 1980 that people like me might be standing before people like you and saying maybe Mr. Boeken's decisions were affected by the fact that this was a highly addictive drug, they acknowledge that wouldn't be a very good thing for them.

And so in 1980, they didn't admit it was a highly addictive drug.

And in 1994, can we see what they had to say about that, please.

(AT THIS TIME THE VIDEO WAS PLAYED)

MR. PIUZE: Here, this is why they believe nicotine is not addictive.

I believe that they are disgusting. And I believe —

MR. LEITER: Objection.

THE COURT: Counsel.

MR. PIUZE: I apologize. I am sorry. I am sorry. Sorry.

They are disgusting. And the companies they had, that put them out front are [5855] equally disgusting.

Nicotine isn't addictive, nicotine isn't addictive, nicotine isn't addictive, nicotine isn't addictive.

Here's 1959, 1959.

This is a Philip Morris internal document. "Why do people smoke."

Reason number three "addiction."

Hers's another one. This is from Dunn, Philip Morris research scientist in Richmond, Virginia.

Let's see what he has to say about this. Here's where he ranked smoking.

"As with eating and copulating, so it is with smoking. The physiological effect serves as the primary incentive; all other incentives are secondary.

"The majority of conferees would go any further and accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no

smoking. Some strong evidence can be marshalled to support this argument.

"No one has ever become a cigarette smoker by smoking cigarettes [5856] without nicotine in them."

"Most of the physiologic responses to inhaled smoke have been shown to be nicotine related.

"Despite many low nicotine brand entries into the marketplace, none of them have captured a substantial segment of the markets.

"Why then is there not a market for nicotine, per se, to be eaten, sucked, drunk, injected, inserted, or inhaled as a pure aerosol? The answer is, and I feel quite strongly about this, is that the cigarette is, in fact, among the most awe-inspiring examples of ingenuity of man. Let me explain my conviction.

"The cigarette should be conceived not as a product but as a package. The product is nicotine. The cigarette is but one of the many package layers. There is the carton which contains the pack, which contains the cigarette, which contains the smoke. The smoke is the final package. The smoker must strip off all these package layers to get that which he seeks. [5857]

"But consider for a moment what 200 years of trial and error designing has brought in the way of nicotine packaging.

"Think of the cigarette as a dispenser for a dose units of nicotine."

One more, if I could, your Honor, please.

This is 1980 and this is before those seven stooges that you just heard. And the 1980, Dr. Seligman, Dr. Osdene, Philip Morris, Richmond, Virginia, says:

"This program includes both behavioural effects as well as chemical investigation. My reason for this high priority is that I believe the thing we sell most is nicotine."

And if 10:30 is the target, that's a good time for me too.

THE COURT: All right, ladies and gentlemen, it's now a little bit past 10:30. We will get back together at ten minutes to 11:00, if everyone would please try to be prompt in getting back here and let's get started on time.

Thank you.

/// /// /// [5858]

(AT THIS TIME, A RECESS WAS TAKEN.)

(THE FOLLOWING PROCEEDINGS WERE HELD
IN OPEN COURT IN THE PRESENCE OF THE JURY.)

THE COURT: Our jury panel is with us. Counsel are present as well.

MR. PIUZE.

MR. PIUZE: Thank, your Honor.

THE COURT: Your jury.

OPENING ARGUMENT (CONTINUED)

BY MR. PIUZE:

Q. Now, I again want to thank you all for your continued attention, because I know what we have seen almost all of the stuff before and I know that you have seen some of this stuff on multiple occasions.

But after however long we have been here, a couple months, and some of the implications of this case, I think that it's a valid use of time just to show these things again and they can speak in many instances way better than I can for what is going on.

I am going to stop talking about [5859] nicotine, sort of like this.

Dr. Osdene tells Dr. Seligman in 1980, that the thing that we sell most is nicotine.

In 1969, Dr. Dunn says to Dr. Wakeham, or vice-versa, I am not positive, "do we really want to t[o]ut cigarette smoke as a drug? It is, of course. But there are dangerous F.D.A. implications to having such conceptualization go beyond these walls."

And I am jumping back to 1980. I believe this is from the trade organization, the C.T.R. — excuse me, from the T.I., Tobacco Institute.

"The entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as free choice if the person is addicted."

And so, when those guys got up, seven of them, and told the United States Congress that tobacco wasn't addictive, it wasn't just cause they felt like it, and it wasn't just cause they didn't feel like admitting it. It was because this was part of a way, way, way bigger and more important thing. Because you see, 14 years before that, in 1980, and back in 1969, they had discussed the fact that if nicotine was really addictive, [5860] it's going to be treated like a drug, the F.D.A. Is going to be there, they don't want the F.D.A. There, and if nicotine is really addictive, lawyers are going to be able to say, you know what, when Philip Morris and the other tobacco companies say tough luck, Charlie, tough luck, Susie, tough luck, Mr. Boeken, tough luck, five million people, tough luck, ten million people, tough luck, you should have stopped, well, if we admit, it's addictive. That's going to screw up our defense.

So we can't admit it's addictive. We can't admit it's addictive because the F.D.A. Will be there. And we can't admit it's addictive because it is going to screw up our defense in court.

So in 1994 when those seven guys lied, it wasn't just for the heck of it. There was a reason for it.

Here, 2001, and ms. Merlo told us that this actually went up on the Philip Morris web site at the very tail end of

2000.

This is for 2001.

"Philip Morris agrees with the overwhelming medical and scientific consensus that cigarette smoking is addictive."

And so the question is, what took them so long, did they do this voluntarily, or did they admit it's addictive for the same reason some [5861] crook or some murderer who's caught dead to rights, all of a sudden, has a change of heart, and says, oh, I have reformed, now that you got me, now that you're talking to me, now that you proved I did it, oh, my lord, I am reformed, so please don't punish me too much.

And Merl[o] said, well, you know, maybe we are a little slow in figuring these things out. But we have had a change of position. They have had a change of position. It's like the health of millions of millions of millions of people is a matter have their given position in a given year or a given month. It's just a negotiating thing. It is something to be changed, we changed our position.

Here's another change in position. This change in position probably should have been made the very year that 13-year-old Richard Boeken picked up his first cigarette.

But unfortunately, and abominably this change in position didn't happen until around that the doctor told him that his lung cancer had metastasized to his brain.

And so they were a little bit late in this change of position. And we are going to talk about the reasons for this change in position, but here it is.

Philip Morris agrees with the [5862] overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema, other serious diseases in smokers.

"There is no safe cigarette."

So here's a change in plan. Okay, well, now, after 50 years, we admit it. But we really can't do anything about it. So it took us a little long to admit it but we can't do anything about it.

And I have two comments for that. I will say them now.

Philip Morris made a cigarette.

Not this cigarette, this is the franchise, this is 30-story advertisements in Hong Kong, 30-story Marlboro advertising.

This is the genesis of an empire.

Philip Morris made a cigarette called Carlton. Dr. Farone was there. Dr. Farone told you about it. And one of the things he said in testimony in this trial was he believes there's a safe cigarette. But we had a change in position — what would happen, by the way, if Philip Morris really, really pushed — did I say Carlton when I should have said Cambridge again?

Mr. Carlton: Yes.

Mr. Piuze: Carlton on my mind.

What would happen if Philip Morris [5863] really, really pushed Cambridge, what would happen if Philip Morris but some nicotine in the filter, which can be done.

What would happened if Philip Morris put some flavor in the filter?

What would happen if the nicotine didn't come out of the smoke which can kill you dead. They finally figured that part out.

Well, one thing that might happen is, the franchise, the cornerstone, the largest consumer product company this the world, not Coca-Cola, would be challenged.

In other words, they would be attacking their meal ticket. Dr. Farone said, Yeah, you can have a safe cigarette, and there's one graph that I hope that I remember some time today to put up there and it's the graph of tar reduction.

And this was done by Dr. Whidby. And it showed the reduction of tar from this big huge thing in 19, whatever it was, 50 something, down to here, 1980 or '90, whatever it was. And I asked him to draw — I asked him to draw out

Cambridge on the chart there. And he got down like this Andrew Cambridge down there and then apologized maybe he drew it too high. That's the bad stuff, that's the stuff that kills people, that's the stuff that [5864] Philip Morris was marketing made, was on the market.

But anyway, Dr. Farone says, he thinks there's a safe cigarette. Let's come back here. I will get to the main thrust.

Okay, in 2001, Philip Morris decides that they agree that cigarette smoking causes lung cancer.

And I want to sort of trace for you, if I could, a tortious little route, how Philip Morris got there, and I want to include in this how Philip Morris is a member of a cartel, a conspiracy, talked through the C.T.R., the T.I.R.C., the T.I., in order to give misinformation and disinformation and flat out lies, counter- information, to us.

Because don't forget, hey, it doesn't matter if we lied or cheated or stole, Mr. Boeken could have done whatever he wanted, just like Sally Smith, Joe Jones, anyone else and it's their tough luck.

Well, this is my favorite.

This is from the Roper proposal, here, and this is — you will see how they got there.

So please, by the way, you know, because most of these documents had been shown and because we had an extended discussion with one of [5865] the witnesses about the C.T.R., and whether the C.T.R. was a legitimate organization or whether it wasn't and whether Lorillard was right and the C.T.R. was a bunch of toothless bozos or whether Philip Morris was right and the C.T.R. was really dangerous to the tobacco industry and heard all about that boom, boom, boom, boom, you want to see some of those documents again, let me show you one you haven't seen.

Now, this is from 1978.

And this is to the committee for tobacco research file. And this is from R. B. Seligman, just in case we forget, here he is. And also present at this meeting here is a Tom Osdene. And lest we forget about Mr. Osdene, here he is. And also present is a guy named Jim Bowling.

These are the people from Philip Morris, Brown & Williamson is there. Reynolds was there. American Tobacco was there. The committee for tobacco research was there. Brown & Williamson, Lorillard and Philip Morris had three different people.

The one on the top, Bowling, is someone we haven't heard too much about. But you got the pleasure of seeing him twice in this trial so far on video tape.

In 1976, there was a British interview where they talked to two of the Philip [5866] Morris people, one was Wakeham.

And at the time that you saw these video tapes before, you didn't know that Wakeham is right up there, he was one of the guys.

Wakeham was the guy. And I want to play that video tape again. But he was the guy who said to the British researcher, gee whiz, too much tobacco, harmful, too much anything is harmful.

He said, and the other guy was Bowling. And I want to play his video tape again too. But there he is, Senior Vice-President Corporate Affairs, Philip Morris, Inc.

1978, meeting in New York.

This whole document should be read later. I am not going to do it all now. But all of the participants of the meetings were reminded that there would be no written record of what transpired that would be issued for distribution.

If you take notes, keep them in your own personal file. This is R. B. Seligman speaking.

"In 1978, as a means of introduction," this person's name, "described the history, particularly in relation to the C.T.R. C.T.R. began as an organization called Tobacco Industry Research Council, (T.I.R.C.). [5867]

"It was set up as an industry shield in 1954.

"That was the year statistical accusations relating smoking to diseases were leveled against

the industry; litigation began; and the Wynder Graham reports were issued. C.T.R. has helped our legal counsel by giving advice and technical information which was needed at court trials. C.T.R. has supplied spokesmen for the industry at congressional hearings. The monies spent at C.T.R. provides a basis for introduction of witnesses."

Let me just stop right there for a second.

Can't admit that nicotine is addictive because it will mess up the litigation and it will mess up F.D.A. regulation.

What happens, what would have happened, what did the tobacco industry fear would happen if it admitted that tobacco caused cancer?

They were afraid of getting sued.

They were afraid of getting regulated.

And because they were getting afraid of getting being sued and because they were [5868] afraid of being regulated, they covered up.

And the unfortunate thing is like so many things in human events, even small human events that we can relate to more, once something gets started, it sort of takes on a life of its own, and it is hard to put the brakes on and it is hard to stop and it's hard to change the direction.

And I think most of us in the course of human events of which we are aware know that sometimes when people start doing something, that they don't see where it is going to lead. They don't necessarily have a terribly evil motive at the very, very beginning. They don't necessarily say, well, I am going to do this and the dominoes are going to fall this way for the next 50 years. They just start digging deeper, digging deeper, and the position hardens, and pretty soon, you can't change, you can't turn, you can't break, you can't do anything. You are locked in.

Now, these people were afraid of lawsuits and because they were afraid of lawsuits, what all of this evidence is going to show as we see it, and because they were afraid their profits were going to go down the tubes, number 1, pulled an ostrich. They put their heads in the sand, didn't

want to know, tried not to know.

Two, when that was over, they went [5869] out of their way to purposely deceive, to purposely deny things that were put out there.

Three, when that part was over, then they started creating doubt, we won't actually deny, but will create as much doubt as we can.

And 50 years' worth of history going on when all of that occurred.

Blank "feels the special projects are the best way that monies are spent. On these projects, C.T.R. has acted as a front; however, there are times when C.T.R. has been reluctant to serve in that capacity and in rare instances they have refused to serve in that capacity."

Now, this is not a document that I discussed with the biology professor, because this was not a document that was shown to her. But this is a document that has always existed since 1978 and this is a document which says the exact opposite of what he came here to tell us here, C.T.R. was set up as a shield, C.T.R. has acted as a front. It is the rare occasion when C.T.R. has refused to serve as a front.

"Major problems exist today because of the advanced ages of most members of C.T.R.'s scientific advisory board. It is felt that they [5870] would be of little use as witnesses today because they could not withstand the riggers of cross-examination.

"Getting away from the historical story," so and so "mentioned that the public relations value of the C.T.R. must be considered and continued. Also, product liability has to be defended, therefore, the industry should not take any action which will dilute the caution label on the cigarette packages."

So there we have them saying we, as a strategy, are

going to sell cancer-causing material to the public and we don't want to mess with those warnings there, because if there's ever a trial, they are going to say, warning, warning, warning, tough luck.

Here, Jim Bowling, Senior V. P. For corporate affairs.

"Jim Bowling added a bit to the history. The T.I.R.C. Was first established at Hill & Knowlton Public Relations when the government began to take action against the industry. The Blatnik committee hearings of the tobacco institute was split out of the [5871]T.I.R.C. Each to handle its own function — science versus public opinion. Jim noted that in the past the industry has been very successful because it has been able to recognize and anticipate trends of both the government and the public; thus, when government action activity takes place, the industry has been prepared to react immediately."

So this is number 331.

Let's just take a quick look at these because we have seen them before.

1953, this is from the State Historical Society in Wisconsin. This has to do with Hill & Knowlton documents.

When Dr. Doll and Dr. Hill and Dr. Wynder put out this incredibly important scientific information, the tobacco industry in America reacted by hiring scientists? Doctors? Spiritual leaders? People to give them lessons in morality? Or public relations people?

The last answer gets the prize.

So Hill & Knowlton was hired to handle the tobacco industry's little problem that its product now was known to be killing lots and lots and lots of people.

"The group was called [5872] together by Mr. Paul Hahn, President of the American Tobacco Company, Chief Executive Officer of all the leading companies, Reynolds, Philip Morris, Benson and

Hedges, U.S. Tobacco, Brown & Williamson, have agreed to go along with a public relations program on the health issue."

A public relations program on the health issue.

"The companies do not favor the incorporation of a formal association. They prefer strongly the organizations of an informal committee which will be specifically charged with public relations function and readily identified as such.

"One name had been considered, tobacco industry committee for public information. John Hill suggested that he felt the word 'research' should appear along with information.

"They realize the industry should not engage merely in a defensive campaign, replying to and answering individual research papers or magazine articles. They feel they [5873] I should sponsor a public relations campaign which is positive in nature and is entirely pro cigarette. They are confident they can supply us with comprehensive and authoritative scientific material which completely refutes the health charges.

"They are also emphatic in saying that the entire activities of the long-term, continuing program, they feel the problem is one of promoting cigarettes, protecting them from these attacks and others expected in the future. Each of the company presidents attending emphasized the fact that they consider the program to be a long-term one."

And here's how long-term it was. That program went on until it was forced out of existence at the end of 1997. It went on from 1954 until the end of 1997.

And incredible, someone in this trial, maybe two people in this trial, one a defense witness, called this an epidemic.

And this epidemic was handled from 1954 to 1957, the public relation team.

"We agree that the major problem is to disseminate information [5874] on hand rather than conduct new research.

"As another indication of how serious the problem is, the official stated that salesmen in the industry are frantically alarmed that the decline in tobacco stocks on the stock exchange has caused grave concern, especially since tobacco, will be much higher next year because of the termination of the excess profits taxes."

We are extremely concerned about the public health of the people who use our products. We are extremely concerned that our stocks will go down on the stock market.

This goes true for all of them, Philip Morris is the acknowledged Big, Big, Big K[ahuna here. Disrespect their customers, disrespected Mr. Boeken, disrespected the public, disrespected the scientific community, disrespected, B.S.'d and lied to the government, and it was done because they are afraid of their position in the stock market and sales of their product.

"The current plans are for Hill & Knowlton to serve as the operating agency of the companies, [5875] hiring all the staff and disbursing all the funds."

There is evidence here from Dr. Goldberg and I think you can see it in this of these documents that the T.I.R.C., was run out of the Hill & Knowlton public relations firm's office. The people that answered the phones and the people that write the letters dealing with the tobacco industry research council were paid P. R. people.

Here's how — excuse me for a second.

Here's how we are about to see how the T.I.R.C. Went about its interests in people's health as a basic

responsibility paramount to all others, we are about to see how they cooperated closely with those who's task it was to safeguard the public health.

Here's how they work.

In August of 1954, this memo was stated to be highly confidential, minimum of circulation, no additional copies will be made.

Here's a history of their progress regarding the public health.

"On January 4, the advertisement and news announcement appeared and the T.I.R.C. Was in being, with Paul Hahn as Chairman for the first three months. [5876]

"Since the committee had no headquarters and no staff, Hill & Knowlton was asked to provide a working staff and temporary office space. As a first organizational step, public relations counsel assigned one of its experienced executives to serve as the account executive. One of his functions was to be the executive secretary for the tobacco industry research council."

Not a scientist, not a doctor, not a professor, not a researcher, not a public health official, but a public relations person.

"The final step in the formal organization of the tobacco industry research council — committee, was the selection of Timothy Hartnett, retiring president of Brown & Williamson Tobacco Company as the full time Chairman, rather than have a rotating chairmanship.

"Periodic meetings are held with public relation reps of the various companies."

Here are some of the things they do.

"Through personal contacts, [5877] advance information was obtained that a prominent magazine intended to report a growing lack of interest in the T.I.R.C. Program on the part of participating companies. This reference was removed from the story when the facts were brought before the magazine editors.

"By personal contact, advance knowledge was obtained of the story on smoking by Bob Considine, for Cosmopolitan. Information was supplied resulting in seven revisions and five qualifying additions to the story which was all in type.

"Personal discussion with the editorial writers and the supplying of materials proceeded the appearance of several positive editorials in the 'New York Daily News.'"

"Through personal contacts, radio and T.V. News men and communicators received frequent information considering — concerning the T.I.R.C."

And I read this during the trial. Before we go all the way, including Los Angeles and [5878] KNX, where they make contacts and try to plant stories.

"One negatively aimed program, WNBT, which was being scheduled on the cigarette controversy was postponed after a discussion of T.I.R.C. Facts.

"Another T.V. Program on ABC which did deal with the cigarette controversy ended on a favorable note after conferences with producers and presentation of facts."

By December of 1957, we start hearing about "research program throws doubts on smoking charges." Who's ears were those doubts meant for? Customers, regulators, government.

Don't worry, it isn't so bad. Don't worry, it isn't what they say. Don't worry, there are other reasons for what's going on. Don't you worry. No substance has been found in

tobacco smoke known to cause cancer in human beings.

There is no scientific mouse carcinogen found that accounts for biologic activity reported on the skins of some laboratory mice.

In 1958, at the American Tobacco Company, when they wrote to Mr. Hill, here's what they had to say. [5879]

"The Tobacco Institute's major area of activity and major objective should be to defend the tobacco industry against the attacks from whatever source on tobacco as an alleged health industry."

Alleged meaning ain't proved. We deny it. Just an accusation. Always innocent until proven guilty. Nothing wrong with our product. Don't you worry.

"In the present state of evidence, the position of the institute should be comparable with that of the T.I.R.C. And its scientific advisory board to the same degree of compatibility as represented by publication tobacco and health.

"The position of the scientific advisory board, to date, is that scientists do not yet know the answer to the question whether tobacco is a health hazard; further research is needed."

That has such a nice ring to it, something that fits so well shouldn't be discarded, but that's exactly what we heard, from that smiling guy from Philip Morris to Congress in 1994.

He said almost verbatim in 1954, [5880] science does not yet know the answer to the question whether tobacco is a health hazard, further research is needed.

Dr. Carchman, let's think about this. Now that Philip Morris has admitted that its product causes cancer, Dr. Carchman has told us that now, finally, starting in the year 2000, a Marlboro cigarette has finally been tested, according to him, for the first time ever, in history, for biologic activity.

Philip Morris finally, after it fessed up, decided that it was going to test a Marlboro cigarette to find out what in it causes cancer.

2000, Dr. Carchman said, in order to find out what, in a Marlboro cigarette causes cancer — by the way, you know, cancer in humans takes a long time to happen. Ten years, twenty years, thirty years. It is maybe a lot of time to find out.

Philip Morris, in order to find out what in its Marlboro cigarettes causes cancer, has signed up some volunteers.

And Philip Morris has had these people sign waivers and contracts because this is such a dangerous undertaking.

Think about that.

They are signing up people to smoke [5881] their cigarettes for a health study that is probably 45 years overdue, and they are making these people sign documents about how dangerous it is.

For all of you former smokers, not the new kind of smoker that you can smoke one a day or one a week or three a day, but for all of you former smokers who were hooked, where the heck was Philip Morris, knowing everything that we know they knew, did they come and get our signatures, did they come and get anyone's signature on a piece of paper saying, listen up, before you smoke this stuff, here's what we truly want you to know, no disinformation, no misinformation, no lies and no B.S.

MR. LEITER: Objection.

MR. PIUZE: Sign here.

THE COURT: The underlying reason, legal reason?

MR. LEITER: Preemption, your Honor. The court: overruled.

MR. PIUZE: So I thought it was like a little bit of six humor after running what is probably the largest human experiment in the history of the world, in which at one time 60 percent of all of the men in this country, in the '50's, and '60's, according to their own witness, smoke cigarettes, that now, finally, after being [5882] cornered, in other words, and after admitting it, now they can test their product to see what in it causes cancer.

And in order to do that, they got to get people to sign on the dotted line first.

It's unbelievable.

"The position of the Tobacco Information Committee representing the interests that support T.I.R.C. But not speaking for T.I.R.C. is an affirmative presentation of material which rebuts and discredits these health charges.

"In my view, the policy of the institute regarding inquiries as to the moderation in smoking should be that we believe that smoking is not harmful to normal individuals, that over-indulgence and excess in anything," this is the apple sauce, "over indulgence and excess in anything may be harmful, that whatever over-indulgence or excess varies with the particular individual who should be guided by the advice of a physical.

"The institute's position on all such matters should be that it is — it has not been proved that [5883] tobacco is a health hazard. It is a universal pleasure of relaxation, hundreds of thousands of people depend on it for their livelihood; any step in the direction of discouraging consumption of tobacco is unjustified and harmful."

I am getting there.

1961, this is for public consumption. Dr. Wynder's opinions do not alter the fact that the cause of lung cancer continue to be unknown, the subject of continuing extensive scientific research by many agencies.

1962, another presents release. The president of the Tobacco Institute sent the following telegram to Frank Stanton, president of CBS.

"I have just received a firsthand detailed account of a preview of CBS reports on 'teenage smoker.' extreme opinions and prejudices without

any real effort to explore the facts and to determine the merits of the positions. The show fails to come to grips with the basic point — that the cause of lung cancer are still unknown and that every effort should be directed toward [5884] finding these causes.”

And I need a change of pace. So because they were — and so the jury needs a change of pace. And so because they were angry at CBS for talking about teenage smoking, let's see what they had to say about teenage smoking.

In 1976, “Why People Start to Smoke,” this is Philip Morris.

Let's talk about Mr. Boeken. I will leave that up there. You can see it and read it and I will talk about Mr. Boeken.

He was born in 1944. On August 15. In 1954, he was ten years old. And in 1954, when he was ten years old, that's when the stuff started to happen. That's when the tobacco industry decided its response should be public relation as opposed to science or public health.

So he's a kid. And he looks around in 1954, and he sees his father smokes, his mother smokes, the kids around the block smoke, the people on television smoke.

And the newscasters smoke, the people on the tonight show smoked, athletes smoke, celebrities smoke. Teachers smoke. Everybody smokes.

Almost 60 percent, according to this witness here, the last witness for Philip Morris, the American men smoked. [5885]

And Mr. Boeken, he wants to find out what this is all about. So at ten years of age, he picks up a butt that someone else has already smoked. And he picks it up and he tries it.

And for all of everybody that's ever smoked, you ought to know the first one isn't very nice.

So that was it for Mr. Boeken when he was ten years old, and he didn't really think seriously about it, I guess, until he was 13 years old and started smoking when he was

13 years old, 1957.

And in 1957, when he was 13 years old, all the kids on the block smoked. And everybody smoked. So he started to smoke and almost immediately started to smoke Marlboros, his brand for life.

Mr. Boeken wanted to be cool. Mr. Boeken wanted to have an adult status.

Mr. Boeken wanted to be grown up. Mr. Boeken wanted to be sophisticated. Mr. Boeken wanted to be in. And those are his words from his video-taped deposition, that also was played a long time ago. And it's here to see it again if you wanted to see it.

But that's what he testified to.

Here's what Philip Morris thought [5886] about why people smoke.

"Among the reasons why children take up the habit are their desire for adult status, their need to confirm to social pressures exerted by other children, in striving for status and self-assurance. Children may imitate their parents or famous people. The association between the smoking habits of parents and children is strong and many sided. More children smoke in families where both parents smoke than in families where neither parent smokes. In adolescent and adult life, similar factors involving the individual's need and his environment appear to play a role in the beginning of smoking."

So Philip Morris, in 1976, was already, from what we know, from what I can show here, nosing around with teenage smokers. But check this out.

1981 — Again, these large ones won't be in the jury room. Small ones will be, and will have yellow highlighting.

In 1981, Philip Morris thinks it's important to know as much as possible about teenage smoking patterns and attitudes. [5887]

"Today's teenager is tomorrow's potential regular customer.

"The overwhelming majority of smokers first began while still in their teens. Smoking patterns of teenagers are particularly important to Philip Morris. It is during the teenage years that the initial brand choice is made. A part of the success of Marlboro red during it's most rapid growth period is because it became the brand of choice among teenagers who stuck with it as they grew older."

Philip Morris tracked the demographics of the teenage smokers. They were down to the age of 12 years of age. We can see how 12 to 14-year-olds smoke more and more as time went on.

And they were tracking this stuff. And Ms. Merlo, when she saw this, what did she say about it?

Unauthorized. Just some demographer. That isn't the way it is. We wouldn't have done that. Trust me. I wouldn't lie to you. That's not what we do.

1981, Philip Morris, we will no longer be able to rely on a rapidly increasing pool of teenagers from which to replace smokers. [58b8]

One of these documents they call "Teenagers Replacement Smokers." Replacement Smokers.

"Because of our high share of the market among the youngest smokers, Philip Morris will suffer more than other companies from the decline in the number of teenage smokers."

1981, this demographer is looking into what happens if there's a Federal excise tax on cigarettes.

And he says, there may come a choice between smoking or cruising around in a car. And the average teenager, teenage male with probably choose the latter.

If there's a substantial excise tax increase, there will be reduced smoking participation among teenagers.

So even though they wouldn't, and that doesn't mean what it says, and even though they wouldn't target teenagers, if they did, rest assured, Philip Morris is a newcomer, don't do that kind of stuff any more, and we have got ms. Merle's word for it.

'98, What's changed?

In the beginning, smoking is about image, 3,000 American teens will light up for the [5889] first time today

— MR. LEITER: I am going to object. It's hearsay being used for truth.

MR. PIUZE: These things were shown. I don't know what to say.

THE COURT: Well, all right. Ladies and gentlemen, these are — these were put in front of you to show you what was being said out in the public, to which Mr. Boeken may or may not have been exposed. And that's the reason it is being offered.

MR. PIUZE: your Honor, this is 1998. Mr. Boeken, this isn't Mr. Boeken. This is for a different person.

THE COURT: who was the witness that put this up?

MR. PIUZE: Cobbs Hoffman.

MR. LEITER: This was cross.

THE COURT: All right. Fair enough, same reason, though.

MR. PIUZE: Okay. The court: not for the truth.

MR. PIUZE: I am not showing this for the truth of the matter stated, I am showing this to find out how much Philip Morris has changed, if it changed, if it had a reason to change, if it didn't have a reason to change.

THE COURT: No, for what information was [5890] out in the public marketplace at the time.

MR. PIUZE: 1999:

"In T.V. ad a grocer assures us when it comes to seeking smokes, kids are cunning and insistent. Life becomes a lot easier, he says, ever since his

store's posted a sign saying 'we card.' the ad's sponsor and signs' supplier, Philip Morris, maker of Marlboro, the number 1 brand among teens.

"Dr. John Pierce, Head of the Cancer Prevention at U.C.S.D., is a bright — is bright as a halogen lamp and as blunt as a Hammar. If the Tobacco Institute ever hires a meteorologist, they're sure to spot this turbulence churning up their radar screens."

Early '90's, Pierce surveyed 3500 plus non-smoking teens.

MR. LEITER: Your Honor, I am going to renew my objection.

THE COURT: Let's take this outside the presence. I would need to review the record.

MR. PIUZE: Okay, well, I have got stuff here that I know for a hundred percent certainty [5891] was shown.

THE COURT: I will tell you what, it is now just a little bit before noon, if you could just kind of conclude in the next two or three minutes and we will take this up over the lunch break.

MR. PIUZE: Sure.

THE COURT: Thank you, sir.

MR. PIUZE: When we come back, I hope to be able to show some documents which will show that despite evidence here and proclamations here from Philip Morris to the contrary, they cannot give up targeting teenage smokers, because if they give up targeting teenage smokers, they go out of business. People start to smoke when they are teens. And if people don't start to smoke in their teens, they don't start to smoke.

And if Philip Morris gives up targeting teenage smokers, Philip Morris will literally be out of the tobacco business.

Dr. Farone's boss has told him when he came in 1976 that they feared they would be out of business in five to ten years. Well, that was in 1976.

The documents that I am going to show, I believe, you have already seen them, clearly indicate Philip Morris isn't giving up targeting teenage smokers. [5892]

Their word on that is no more to be trusted than their word on your health is important, our customers are most important, we wouldn't dream of hurting you, and we will go out of business tomorrow if we hurt you, and tobacco doesn't cause cancer, and from Mr. Bible, I would shut the factory down tomorrow if even one person ever died from our product.

Thanks, Judge.

THE COURT: All right, thank you very much, counsel.

Ladies and gentlemen, we will take our break. Be back here at 1:30 this afternoon.

Remember, do not discuss this case with anyone. Thank you very much.

(THE FOLLOWING PROCEEDINGS
WERE HELD IN OPEN COURT OUT
OF THE PRESENCE OF THE JURY:)

THE COURT: We are outside the presence of the jury.

This particular document that we looked at, the "L.A. Times" article, is it part of a group of documents that were used in connection with the historian?

MR. PIUZE: Yes.

THE COURT: All right. In which, [5893] basically, she looked through a series of documents, through the "L.A. Times" and other places and then recounted the history of smoking to the jury in the United States, basically?

MR. PIUZE: No. The timing was the opposite. She had gone through a tremendous volume, recounted the history of smoking and what was in the "L.A. Times."

On the cross-examination, I wanted to just test her and say what have you seen, since you started on this project, so these documents are all from the timeframe of when she started on her project.

THE COURT: These are documents that you put together?

MR. PIUZE: Yes.

MR. LEITER: Yes.

THE COURT: Then that would be different.

MR. LEITER: just to be clear, your Honor, on the timing, these are not documents from within the time period that she studied. She stopped her study in 1994. These are documents from 1998 and 1999, which were part of a cross-examination, I think, to make a different point.

But here's my objection. It's very simple and that is he was about to use that document to tell the jury about a study conducted [5894] by peers, and what that study found.

So he's using the article to talk to the jury about the substance of the information contained in the article, that's the basis of my objection.

MR. PIUZE: These were all used with Merlo, Ms. Merlo, the company spokesperson. And when she was talking about the fact that — when she was talking about the fact that Philip Morris doesn't target teenagers at all, we went, I went through with her and got the American Lung Association, the California State Attorney General, the California State Superintendent of Schools, and the Committee for Tobacco-Free Kids couldn't trust her or Philip Morris any further than they could throw them. And these documents were used during that cross-examination too.

MR. LEITER: For a different point.

THE COURT: The point is that these documents were not offered for the truth of the studies and so forth contained in them.

MR. PIUZE: That's true.

THE COURT: Well, so I would allow you to use it in the context in which they were used for witnesses, but not for the factual assertions.

MR. PIUZE: I will say it.

THE COURT: That has to be clearly stated to the jury when you use the documents. [5895]

MR. PIUZE: I will say it just that way.

THE COURT: Fair enough. Thank you, good counsel. You have a good lunch. We will see you at 1:30 this afternoon.

MR. LEITER: We need to talk about the verdict form.

THE COURT: Right.

MR. LEITER: When did you want to do that?

THE COURT: How about 15 minutes early.

We will see you at 12:15, in chambers — 1:15, in chambers.

(AT 12 NOON, THE LUNCH RECESS WAS
TAKEN TO 1:30 P.M. OF THE SAME DAY.)

[5895]

THE COURT: Our jury panel is with us; counsel are present as well.

Good afternoon, counsel

(CHORUS OF GOOD AFTERNOON'S.)

THE COURT: Good to see you. Mr. Piuze.

ARGUMENT (RESUMED)

BY MR. PIUZE:

Well, your Honor, I figure when two of the jurors don't come back, maybe I spent too much time on teen smoking.

And there's so much stuff here, I've got to make a command decision, and the decision is, risk boring some of you by banging away at this stuff again. I think [5896] it's super important. So I mean, there's so many votes for that. And let it slide in order not to bore you. But maybe one of these documents or one of the things that I think is important here slipped during the trial.

So I'm going to vote for boring you. But with an asterisk. I think this stuff here is super important. I think that out of all of the tens of thousands or however many juries there have been in the United States that have ever looked at anything in a civil case, ever, any kind of a civil case, ever, that you are one of the extreme few jurors ever to lay eyes on stuff like this in hundreds of years.

MR. LEITER: I'm going to object to that, your Honor.

THE COURT: Sustained.

MR. PIUZE: Can you turn that on for me, please.

Okay. The purpose of showing you this teen smoking thing, which I'm going to do quickly, is not for the truth of the matter stated in here. It is to show what professor Cobbs Hoffman, number one, and Ellen Merlo, number two, have to think or what they've avoided thinking or how they responded to certain of these charges.

Ms. Merlo, don't forget, ascribes and subscribes to a clipping service, and because she's what she does in the corporation, anything that the press writes about comes to her attention. So she sees it. She sees it automatically. She looks at it. And she was up here to respond to some of these things. So I'll just take a couple minutes, go through it. Go on to the next topic.

This is the 1999 — on October 31st of 1999, [5897] the San Diego union. And this is a guy named Pierce, who's at the ucsd. And professor Cobbs Hoffman was familiar with him. He surveyed teen smokers to find out what made them smoke.

(Paraphrased reading:)

Most popular response:

Cigarette ads, 2 to 1. Anti-smoking ads, he says, are merely a high profile smoke screen, probably intended to shield big tobacco from lawsuits. Smoking ads cost the industry over \$5 billion year.

L.A. Times, 1998, in May.

(Paraphrased reading:)

Smoking about image. 3,000 teenagers will light up for the first time today. I want to look cool.

San Diego, March, 2000.

(Paraphrased reading:)

City council down there in national city was requiring an ordinance requiring merchants to keep cigarettes and other tobacco products behind the counter and when within 1,000 feet of schools. The law [5898] could require that stores near schools keep tobacco ads away from products, like candy.

We know that the tobacco industry strategically places their products next to products that appeal to — excuse me — next to products that appeal to children, particularly in stores near schools, says Deborah Kelley, American Lung Association V.P. for governmental relations. That's why we feel there has to be a visual separation to sever the connection between the 3 musketeers and the Marlboro man.

San Diego, May 18, 2000.

(Paraphrased reading:)

Cigarette makers have increased advertising in magazines with large teen audiences since 1998.

San Diego, November 30, 2000.

(Paraphrased reading:)

State school superintendent Delane Eastin and local American Lung Association are urging schools to reject free textbook covers from cigarette maker Philip Morris. [5899]

November 29, 2000, L.A. times.

(Paraphrased reading:)

Shasta county high school district gets handout
1,000 philip morris book covers with Philip Morris
written on cover. District disposed of them.

L.A. Times, November 17th, 2001.

Philip Morris stops sending free book covers to
California public schools but has not agreed to
recall them.

The covers were an attempt by Philip Morris to
promote its corporate identity and, consequently, in
cigarettes to children through illustrated book
covers, said attorney general bill Lockyear.

Ms. Merlo told us, you, us, all of us here, that the new
Philip Morris — first of all, denying that the old Philip
Morris ever targeted kids, ever — looking at those blow-ups
that I showed you this morning and say, who can explain
them, who knows why, but that sure wasn't us. It was
someone that snuck into our building at night.

But if we did, we would never do it anymore. Our
stockholders wouldn't allow it. We would never do it
anymore. And I asked her — and I showed her some of these
[5900] very things here — would the American Lung
Association trust Philip Morris any further than they could
throw it?

No.

Would the committee for tobacco-free kids trust Philip
Morris any further than it could throw it?

No. How about the State Department superintendent of
schools here in California — no — Bill Lockyear?

No. They wouldn't trust us. But, ladies and gentlemen,
you, you should trust us.

So that's what I have to show about kids and smoking.
No kids; no smoking. No smoking; no profits.

Ellen Merlo saying, we will stop selling to kids and
targeting kids is like that guy in 1954 saying, if this product
is harmful, we'll stop, we'll got out of the business.

It's like Bible saying in 1998 in Minnesota under oath, if he thought one person died from this — what a stupid thing to say, if I thought one person — where's he been hiding — died from this, we'd be out of business. We'll stop business.

That's ridiculous. It's an insult to the intelligence of anyone.

Let me take a little historical run here on some of these things that were being said by —

Mr. Boeken was a young man, and when there was some sort of a knowledge out there that he absolutely should [5901] have had, should have figured out, should have felt, let's go through a little historical stuff here. Please.

Here is March of '65. This is the tobacco institute.

The cigarette manufacturers told Congress through the chairman of the board of R.J. Reynolds, who was appearing for the whole industry, spokesman for nine cigarette manufacturing companies, expressed industry opposition to regulation.

(Paraphrased reading:)

The cigarette industry's position is based on three bases.

First, the industry is profoundly conscious of the questions concerning smoking and health.

Second, many scientists are of the opinion that it has not been established that smoking causes lung cancer or any disease.

Third, a great deal more research needs to be done.

This is a transition document. I'll state that lawyers were in charge of medical and/or scientific decisions at the tobacco companies. Decisions on whether or not to do legitimate scientific testing, legitimate biological testing were not made with the scientists or doctors who should have [5902] been in charge of them, or at least not totally made. These decisions were influenced by attorneys almost

all the way.

The attorneys got involved because, one, they wanted to preserve some sort of a litigation strategy for right now, today; whether today was going to be 1975 or '85 or '95 or 2005 didn't matter. But rather than develop these products in order to guard health, what was being considered was litigation strategy, and what was being considered was influencing Congress. So this is one of the documents that starts talking about that, and there'll be others.

This is an important document, right here. October 14, 1969. And this is Mr. Wakeham. He was one of the top two guys across the top line.

(Paraphrased reading:)

The scientific expertise of the industry, because of the liability suit situation, has not been permitted to make a contribution to the problem, a contribution which I believe was and is vital because the industry scientists are willing to consider the scientific problem from the point of view of the industry rather than from the position of the Public Health agency.

And then (paraphrased reading):

At the beginning of our [5903] support of smoking and health research, this failure may have been connected with our consistent denial of the statistics and our continued assertion that this is nothing to the cigarette causation hypothesis.

1967. This to Clements. Clements is with the tobacco institute.

(Paraphrased reading:)

The tobacco industry has a very serious problem in the current tobacco health controversy. It is

rapidly becoming worse. Prior to 1954, the problem was mainly a public relations problem, and our opponents had no effective base to work from. In December of '53 with the publishing of the Wynder, graham and Croninger paper, the problem not only intensified, but became a scientific one.

In the last 14 years, this problem has become much more complex, more involved and much more serious. Although this problem has public relations, business, legal and political components, it is basically a scientific one. So far, however, the major efforts of the industry to cope with this probe have been other than [5904] scientific.

Here's 1970. This is Mr. Wakeham. This is Philip Morris. December.

(Paraphrased reading:)

It has been stated that CTR is a program to find out "the truth about smoking and health." What is truth to one is false to another. CTR and the industry have publicly and frequently denied what others find as "truth." Let's face it. We're interested in evidence which we believe denies the allegation that cigarette smoking causes disease. If the CTR program is aimed in this direction, it is, in effect, trying to prove the negative, that cigarette smoking does not cause disease. Both lawyers and scientists will agree that this task is extremely difficult, if not impossible.

Which gets me to what I believe — excuse me — what gets me to the most important exhibit in this case. And this is the roper proposal of 1972. And this is the height of hypocrisy right here.

Dr. Benowitz talked about the fact that when you've got someone who is addicted, a person who's addicted is going to

tell themselves stories, and whether you call it, [5905] rationalize or whatever you call it, someone who's hooked is looking for a reason to believe that they can continue in their conduct. And I think that's something that's probably disputed here. Someone that's hooked is more apt to believe a story than someone who isn't.

This is the hook. This is where they talk about the hook. Right here.

(Paraphrased reading:)

For nearly 20 years, this industry has employed a single strategy to defend itself on three major fronts — litigation, politics and public opinion.

While the strategy was brilliantly conceived and executed over the years helping us win important battles, it is only fair to say that it is not — nor was it intended to be — a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of . . .

Now, obviously, during the course of this trial — I'll put that where the jury can see it. And during the course of this trial — this is the long time line.

This will not go to the jury, and so I'm going to bring it out in a little while and discuss as it related to Mr. Boeken.

But what they say in writing for the world to [5906] see is that they are going to try to create a doubt in People's minds about what these scientists say without actually denying the charge.

Now, please think about this here. Whether it's Richard Boeken or the 5 million or 10 million or 30 million other smokers that have a heck of a lot of trouble quitting, one of the reasons they have a little trouble quitting or a heck of a lot of trouble quitting is because there was doubt forever and ever purposely implanted in their brains about whether it was really true what everyone said; is it really true that smoking causes lung cancer?

As recently as last week, Dr. Hoshizaki said, well, you know, only 20 percent get it, 80 percent don't. We can't get it in animals, we can't put a human tumor in animals, we still can't. I mean, these were important questions. We could never figure these things out. I, as a biologist professor at the university, couldn't figure these things out. And we still don't have answers to these questions.

Well, these questions were out there and people that want to, need a reason to, make believe or have something to grab onto were hand fed this starting way before 1972.

This is what you're going to be reading. The judge will read jury instructions. Later on, the jury instructions will be given to you. There are about four or five or six different kinds of fraud that are claimed in this case. Let's start with this. [5907]

(Paraphrased reading:)

The essential elements of a claim of fraud by an intentional misrepresentations are:

Philip Morris must have made a representation as to a past or existing material fact.

It won't hurt you. We're united in your health. Our products are safe. We'll work closely with the authorities to take care of it.

Mr. Weisman; we'll close the doors if we think it will hurt you.

Mr. Bible; we'll go out of business, et cetera, et cetera, et cetera.

(Paraphrased reading:)

The representations must have been false.

Philip Morris must have known that the representation was false when it made it.

Or must have made the representation recklessly without knowing whether it was true or false.

Let's think about that. If Philip Morris [5908] truly, with all of the resources at its beck and call, did not know for sure whether or not tobacco caused cancer, why in the world should it deny such a thing?

Why shouldn't it say, gee, we've got 1,000 scientists over here that say yes, and we've got a couple people over here that say no. So, hey, what the heck. But they affirmatively said no. But even if she said, you know, what — it's an open question — they shouldn't have, because it wasn't an open question.

(Paraphrased reading:)

The defendant must have made the representation with an opportunity to defraud the plaintiff.

That is, the defendant must have made the representation for the purpose of inducing the plaintiff to rely on it and to act and refrain from relying on it.

It's another one of these instructions that says the plaintiff — anyone in the population who listened to this is in the class, anyone, not just Mr. Boeken. Anyone out there.

(Paraphrased reading:)

The plaintiff must have been unaware of the falsity of the representation, must have acted in reliance upon the truth of [5909] the representation, and must have been justified in relying upon the representation.

And here is a place where professor Cobbs Hoffman would say, wait a second. Anyone — she said this — anyone who would listen to tobacco industry executives are fools. Anyone who would listen to what their clients, executives say, should have their heads examined. Anyone who would believe what a tobacco company would say would have to

have a developmental defect.

This comes from a professor of U.S. history. And this comes from a professor of recent U.S. history. And I sure hope that future professors of U.S. history don't have to write that we have sunk to such a situation to such a low level that we should have our heads examined, and we are mentally defective or developmentally disabled if we listen to what the heads of gigantic corporations say.

Once upon a time in America, people like this used to be our leaders and respected, and not only once upon a time, but now, they get chosen for the cabinet of the government.

But professor Cobbs Hoffman would say, you can't trust them, you shouldn't trust them; if you trust them, you're a fool.

What a defense. We're such snakes that if you trust us, you're a fool. What a defense.

That's called intentional misrepresentation. Here's a brother or a sister. [5910]

(Paraphrased reading:)

Expression of opinion.

Ordinarily, expressions of opinion are not treated as representations of fact upon which to base actionable fraud.

However, when one party possesses or hold — this is Philip Morris — when one party holds himself or herself out as possessing superior knowledge or special information regarding the subject of a representation, and the other party is so situated that he or she may reasonably rely upon the supposed superior knowledge, a representation made by the party possessing — holding himself or herself out as possessing such knowledge or information will be treated as a representation of fact.

When Philip Morris states an opinion as a fact in such a manner that is reasonable to rely and act upon the fact, it is it treated as a representation of

fact.

This is called (paraphrased reading):

Fraud and deceit, concealment.

Philip Morris must have concealed or suppressed a material fact prior [5911] to July 1, '69.

Which is a magic cutoff date for us here for a couple of issues. One of the issues in this case has to do with a failure to warn. And another one of the issues in this case has to do with a failure to show people how to properly use a product. And I'm talking about light cigarettes. And I'm talking about compensation. And I'm talking about a situation where people who think they're smoking down to a lower tar cigarette, they really think they're going to get lower tar, and they don't.

Up until 1969, Philip Morris had a duty to warn the public, anyone, everyone, all users, about the dangerous propensities of its product.

The cutoff date, magically, is July 1, '69. After that time, there was no such duty.

Similarly, up until July 1, 1969, Philip Morris had a duty to warn people who bought light cigarettes that, guess what, you're buying these low-tar cigarettes, you think you're going to get less tar, you think you're going to get less of the bad stuff, you think you've got less of a chance to get sick. Wrong, wrong, wrong, wrong, wrong.

After 1969, no such duty claimed in this case. So back to this.

(Paraphrased reading:)

The defendant must have concealed or suppressed a material fact prior [5912] to July 1, '69.

We've had a ream, mound, huge pile of documents in which they conspired to do just that. We're going to dummy up and not tell anyone about what we know about what's in these cigarettes and what it does to you.

The defendant must have been under a duty to disclose that fact to plaintiff and everyone else that's smoking. Obviously, a manufacturer of a product has got to tell — a reasonable manufacturer of a product has got to tell about the bad side effects, about what's really going on, not give false information, misinformation, disinformation.

(Paraphrased reading:)

Philip Morris must have intentionally concealed or suppressed the fact with the intent to defraud plaintiff.

The plaintiff must have been unaware of the fact and would have acted — would not have acted as he or she did if known of the concealed or suppressed fact.

And I want to tell you. I asked Richard Boeken — and it's there in the volume of a deposition. And it's a what-if question. But what if they said — they said, don't forget, Mr. Boeken was aware of the Surgeon General's report. Mr. Boeken was aware that warnings [5913] were made. Mr. Boeken was aware of what he called a — what's the word — brouhaha?

MR. CARLTON: Something like that.

MR. PIUZE: A brouhaha or thing-a-ma-jig, a fight between the tobacco companies and the Surgeon General. He was aware of that. And he listened to it. And he said, you know what, I thought the Surgeon General was on a political vendetta. I believed what she said. I listened to them. He and 50 million other people.

Now, was he justified in listening to them?

We're back to professor Hoffman now. According to professor Hoffman, no. When someone looks you in the eye and makes you promise and tells you, this ain't going to hurt

you, don't worry about it. We promise you. You are not entitled to rely on that.

Mr. Boeken did. Mr. Boeken is a businessman. Mr. Boeken has expressed admiration for big business. His wife backs that up. His wife said that's the centerpiece of his life. He really, really, really loves it. He told you on his videotape deposition he couldn't conceive of these people standing up, all of these extremely responsible people, standing up and lying under oath.

He was wrong.

How about the cousin?

(Paraphrased reading:)

Fraud and deceit.

Active concealment of known [5914] facts.

Intentional concealment exists where a party, while under a duty to speak, does, nevertheless, does so —

THE COURT: No. Under no duty to speak.

MR. PIUZE: Excuse me. That's a sign.

(Paraphrased reading:)

Intentional concealment exists where a party, while under no duty to speak, nevertheless, does so, but does not speak honestly and makes misleading statements or suppresses facts which materially qualify those stated.

And the English of that is, if you don't have to say anything, but you do, and it's misleading, and you know it is, and you suck someone in, that's wrong.

Here's another one (paraphrased reading):

Fraud and deceit, false promise.

But I'm tired of reading, and you're tired of listening. There are about seven of these things. And every one of these things has to do with fraud. The subject matter is fraud. And the issue is, Philip Morris knew everything it [5915] had to know and either lied about it or covered it up or dummied it up or didn't let it out or gave misinformation or gave disinformation:

Listen to this, please. This is Dr. Farone.

MR. LEITER: Page number, please.

MR. PIUZE: 1549.

MR. LEITER: Thank you.

MR. PIUZE: (paraphrased reading):

About a year and a half after I had been there, I had been told by Dr. Osdene on several occasions that one of his main missions, as he put it, was to maintain the controversy, meaning, keep shedding doubt on whether or not Nicotine was addictive and whether or not smoking caused disease.

It was his job to maintain the controversy?

About whether Nicotine was addictive?

Even though you knew Nicotine to be addictive?

It was his job to maintain the controversy about whether tobacco caused disease.

Even though you knew tobacco caused disease. [5916]

It's an amazing — this is the guy who said that if the Nicotine studies turn out wrong, destroy them.

This is the guy who said, if the tests come back from Germany, send them to my house. They're going to be destroyed.

This is the guy who showed Dr. Farone a test of a real, honest to God, real Marlboro cigarettes back around '79 or '80 that had been done for biological activity, and this has been a document that has never been found. This is a document that Philip Morris denies the existence. Never happened. Couldn't have happened.

This is page 1560 (paraphrased reading):

Dr. Osdene was a colleague of mine. It was his responsibility to do safety testing on cigarettes. The way this was done was to have the tests done in Europe and Philip Morris — at the time, I didn't know Philip Morris actually owned a facility, but Philip Morris used a facility in Germany called the, in German, the institute for biological technology. The ACRONYM is inbifo, and that was a laboratory in Germany where products were sent to be tested for all of the kind of testing that we just talked about, the in vivo testing as well as the in vitro testing. [5917]

In vitro is a tease. In vivo is real-life subjects, whether animal or not.

This is page 1513 (paraphrased reading):

Did high-ranking people at Philip Morris discuss the gentleman's agreement with you?

Sure. Seligman, Osdene, Wakeham, Resnick, carpenter, Kuhn, pages, Hauserman, gaisch. As they told it to you, why not put up a Marlboro against a Winston or a Winston against a kool or a kool against whatever's out there?

His answer was: The information could be used in court proceedings like this to prove that the products are carcinogenic.

If you do an animal test, when you do the animal test, what you're doing is, you're saying the animal is a model for humans. You can never use an animal to exactly mimic a human without using humans, but you are not going to use humans in tests.

Well, as it turns out, epidemiology is a human test, but you don't intend to test your products on humans to start off with. [5918]

So if they tested your chances in Winston versus Marlboro and your Marlboro changes, and you showed that they caused cancer in animals all

the time that you did this, then it would have been very, very difficult to say that you didn't have any evidence that it caused cancer, but you have lots of evidence that it caused cancer in animals.

So it just adds to the information that we know about these products.

If, in fact, there was a difference between two brands that were being sold, the concern was that people would always migrate to the safer one, obviously.

Before I turn the page, let me just stop this. That sounds pretty probable, huh; that people would migrate to the safer one?

This is Dr. Farone during his cross-examination by Mr. Leiter here at page 1594 (paraphrased reading):

You would agree that there's no such thing as a safe cigarette; is that right?

And Dr. Farone said, I think I've testified in the past — I've given [5919] parameters of how we could state that a cigarette could be safe where you couldn't, epidemiologically, tell the difference between the use of that cigarette and nonsmokers; but I mean, in terms of a normal cigarette, there's no such thing as a cigarette., a normal cigarette on the market right now that's absolutely safe.

Is it your testimony there could be a safe cigarette on the market today?

Yes, there could be a safe cigarette on the market today.

But what happens, for instance, if Cambridge was on the market today, and Cambridge was 0.1 milligrams of tar. What if?

99 plus percent less of the bad stuff. Virtually no bad stuff.

If there was a difference, he says, between two brands that were being sold, the concern was that people would always migrate to the safer one.

And if there was a difference between two brands that were being sold and people always migrate to the safer one, the foundation of the empire was in jeopardy.

Cambridge cigarettes, hard to light. And in the 1980's, that cigarette had the lowest tar figures ever, ever seen, ever anyplace on a cigarette, and it was hard to [5920] light.

I already mentioned this morning that flavor and Nicotine could both be put in the filter. I asked Philip Morris' witness, tell us you tried that or tell us that you can't do it, whatever the question was. He wouldn't. Dr. Farone said both of those things could be done., but it was hard to light.

And look what happened with that 20 years later, and we come in here with an electronic gizmo that gives you seven puffs with a cigarette — do it with some sort of a battery. Hard to light. Hard to catch cancer. Impossible to catch cancer.

Dr. Farone says there is such a thing as a safe cigarette, but they didn't want to pursue it. And while I'm on it, let me take two minutes there.

There was more than a day reading of these depositions. Uydess, Mele. One of them was a rat researcher. He was a Nicotine researcher. The research was being done in Richmond, Virginia. It was done under secret conditions. The rats were brought in, covered up with — they had tarps on them, and no one was supposed to know they were there. And they were secret animal labs, and no one was supposed to know about this. And it was all top secret.

What they figured out was that these rats were just as hooked on Nicotine as they would have been on cocaine. And there are several documents either that you will see or that I'll get to and read that flat out say, a lot of people in science say that Nicotine is just as [5921] addictive as heroin.

And Dr. Benowitz said that, too, when he was hear. And Dr. Benowitz is probably the world's single leading authority on Nicotine injection in the world. And when the

Surgeon General needed someone to write his report on addiction, that's where he went, to Neil Benowitz.

Anyway, one of those two depositions revolved around the entire fact that Philip Morris was conducting — keeping secrets from everyone else in richmond, experiments about rats wanting and needing and craving and being addicted to Nicotine. And that program one day was just shut down by authorities, people from New York. The people from New York took a look around, and the next thing you knew, the entire project was history.

And the other guy, Uydess. He was on the nod project. And the nod project had to do with taking some really, really, really bad stuff out of tobacco. Really bad stuff. And so you heard here the way it worked out was, gee, it smelled.

Well, the testimony you heard from him and/or Dr. Farone — one or both, I'm not sure — was that that was a viable project, and that project was set down prematurely.

If, in fact, there was a difference between the two brands that were being sold, the concern was people would always migrate to the safer one. And a lot of business would have been lost. You would have had to change the products too often.

And then he said that he heard about the [5922] gentleman's agreement the week that he joined the company.

This roper proposal that I had up on the board talked about politics, so I just want to talk a little bit about politics.

This is page 1500. This is Dr. Farone testifying.

(Paraphrased reading:)

Dr. Seligman, who became my boss, was very clear on the two main functions that they were interested in my helping them with. Based on my background, one was diversification into areas other than cigarette products. And the second was making the product, the cigarette product, safer.

Seligman and Wakeham and Resnick indicated they were concerned that the cigarette industry would face increasing regulation, the products would be either banned or changed approximately in five to ten years. They were thinking they'd have a great deal of difficulty selling products, therefore, they wanted to take the opportunity to move into other businesses, while, at the same time, trying to improve the safety of the product. [5923]

In 1976, they thought they had five to ten more years of unfettered business.

This is something that professor Cobbs Hoffman brought in.

MR. LEITER: May I see it, please?

MR. PIUZE: Sure. It's the cartoon from 1988.

MR. LEITER: May I see it for one more second? I'm sorry. MR. PIUZE: I'll read it for you.

MR. LEITER: Your Honor, I'm going to object to this.

THE COURT: Was this from Ms. Hoffman —

MR. PIUZE: Yes. It's been displayed when she was cross-examined.

MR. LEITER: Objection. Noerr pennington as to the argument. THE COURT: If this was part of her testimony, something she reviewed, overruled.

MR. PIUZE: So anyway, that speaks for itself.

Politics, public opinion and litigation. And I'm here, obviously, on the last, but they're active not just on the last. And so now I have a question. And the question is, how do you spell justice?

There's two possibilities. I guess it depends who you are how you spell justice.

But, Um . . .

Here's where I want to go. To litigation. Not to politics and to public opinion. This will be the last time I read this. I think this is super important for [5924] Mr. Boeken. Super important for 5 or 10 or 20 other million people.

(Paraphrased reading:)

In the cigarette controversy, the people, especially those who are present and potential supporters (tobacco state Congressmen and heavy smokers) —

And I don't care about tobacco state Congressmen. I care about heavy smokers.

(Paraphrased reading:)

— must perceive, understand and believe in evidence to sustain their opinions that smoking may not be a causal factor.

So let me put a name on that. Heavy smoker, Richard Boeken, who's been giving us his money since 1957 when he was 13 years old, and who's been hooked on this product for the last 50 years, since he was 13 years old, must perceive and must understand and must believe in evidence that will sustain his opinion that smoking may not be the causal factor to cancer.

So they're going to feed him and 5 or 10 or 15 or 20 or 40 million other people a little bit of disinformation. [5925]

(Reading:)

"As things stand, we supply them with too little in the way of ready-made credible alternatives."

"The alternatives."

Two of them.

"1. The constitutional hypothesis. People who smoke tend to differ importantly from people who do not in their heredity, in constitutional make-up, in patterns of life and in the pressure under which they live.

"2. The multifactorial hypothesis. As science advances, more and more factors come under suspicion as contributing to the illness for which smoking is blamed — air pollution" . . .

Air pollution. Los Angeles. Early '70's. Might not be able to see your hand in front of you again. That's what's causing your cancer. It isn't cigarettes. It's that.

(Paraphrased reading:)

Viruses, food additives, occupational hazards, stresses."

In 1970, our public opinion [5926] survey showed that 52 percent believed that cigarettes are only one of many causes of smokers having more illnesses. It also showed that half of the people who believed that smokers have more illnesses than nonsmokers accepted the constitutional hypothesis as the explanation.

Thus, there are millions of people —

and I want to stop here again.

Millions of people, including Richard Boeken — not Richard Boeken alone, not Richard Boeken and other members of alcoholics anonymous, not Richard Boeken who was a hippie, And not Richard Boeken who is going to become a conservative businessman — but Richard Boeken, as one of millions of people who would be receptive to a new message. And the new message is (reading):

"Cigarette smoking may not be the main health hazard that the anti-smoking people say it is because other alternatives are at least as probable."

So in 1972, the tobacco institute decided that what should be done is to spoon-feed misinformation, disinformation, counter-information and lies to people to keep them smoking, to keep money rolling in. And [5927] unfortunately, to keep the undertaker busy.

This one document — this is exhibit 330. This one document, if there is one document in the case that shows the hypocrisy and the dishonesty and unforgivable conduct of the tobacco industry over a course of decades in this

country, this is it right here. 330.

I'm done with this kind of document. Promise. 1974.
June. Lorillard.

(Paraphrased reading:)

Historically, the joint industry-funded smoking and health research programs have not been selected against specific scientific goals, but rather, for various purposes, such as public relations, political relations, position for litigation, et cetera. It seems obvious that reviews of such programs for scientific relevance and merits in the smoking and health field are not likely to produce high ratings. In general, these programs have provided some buffer to public and political attacks of the industry, as well as background for litigious strategy.

I'm showing you to show conspiracy — (reading): [5928]

"CTR is the best and cheapest insurance the tobacco industry can buy, and without it, the industry would have to invent CTR or would be dead."

And the amazing thing is, whoever wrote that, forget that the tobacco industry did invent CTR, or it would have been dead.

And this that we spent too much time on in 1978, Dr. Summers, states that (paraphrased reading):

The CTR should be renamed for council for legally permitted tobacco research.

Imagine that. Before we can do our research, we will have to run it past our lawyers. Our lawyers will be in charge of the safety and research for our company. Not our

scientists, not our doctors, but our lawyers will be in charge of the research for the company.

And he talks about the fact that they lost Dr. Craighead. And there are two other documents which I'm not going show you, because I just don't want to beat this unmercifully to death, where there was talk about other people leaving the programs, other scientists leaving the programs because they can't put up with the outside pressure.

Now, I'd like to talk about Mr. Boeken.

Maybe it's best just to put it here. If you [5929] want to bring one of those easels, you can.

Do you like being there?

Nice tie.

MR. GOLDSTEIN: Thank you.

MR. PIUZE: This is last time you're going to get to see this, probably. And I APPRECIATE your attention in looking at it.

This is a history in which we have tried to overlap what went on in Mr. Boeken's life with what went on in science with what went on in the misinformation, disinformation, lying of the tobacco industry and Philip Morris.

And this story covers, it looks like, 50 years, almost. And unfortunately — have you got that now?

Here, let me slide this up here.

Unfortunately, Philip Morris fessed up too late for Mr. Boeken. Just remember, as you look at this document here, every, single year on this document is 400,000 lives that end prematurely from smoking in this one country. Just remember that of those 400,000, Philip Morris has half the market share. 200,000 every succeeding year.

And also, please remember that for each and every single year you see here, roughly up to 75,000, in round numbers, people die in the United States of lung cancer caused by smoking and tobacco and Philip Morris has 50 percent of that share.

So every year, it's 175,000 lung cancer deaths that are preventable from smoking. And every, single year is [5930] 400,000 deaths overall that's preventable from smoking.

Mr. Boeken, according to the only evidence we've had in this trial, uncontested from Dr. Hammer, right here — or right here — had lung cancer. 1989. He didn't know it. His doctors didn't know it. Those little cells were multiplying and multiplying and multiplying. It got ten years worth of multiplying to get to the size where it showed up.

But way back in 1989, it was already too late for him. So by the time that Philip Morris decided to change its position, as Ms. Merlo said — or excuse me — by the time, alternatively, that Philip Morris and the other tobacco companies got cornered, put in a corner from which they couldn't escape, and put up their hands and surrendered — sort of, depending on how you look at it — it was already ten years late for Mr. Boeken because he was going to get cancer, and lung cancer is not a curable disease.

Slide that back now, if you would, please.

1912, Titanic went down. More people died in the Titanic than died in the entire country from lung cancer. It was an almost unknown disease. Dr. Ludmerer, Dr. Doll, Dr. Feingold, Dr. Strauss, they all discussed the fact if you saw a lung cancer patient back then, the professor called the medical students and said, come take a look at this, you may never ever again see this in your lives. Someone with lung cancer. Amazing.

Cigarettes became popular going towards the [5931] 20's. We had the machines that made the cigarettes. Cigarettes were all over the place. According to professor Cobbs Hoffman, there were seven or more states.

(Juror sneezes.)

MR. PIUZE: Bless you. Twice. It's always twice. Bless you.

According to professor Cobbs Hoffman, there were at least seven states that banned tobacco. According to Dr. Doll, he thinks it was more than that. But it was banned in these states.

With the increasing use of tobacco in this country and in Europe, lung cancer rates went up like a rocket.

1950, and when the first studies that we discussed too many times already were published. By 1952, there were more studies. And in 1954, there were enough studies and there was a big enough deal so that the Frank statement was put out by the tobacco industry.

And there's the Frank statement. We've discussed it and have read it and I've read it. There it is in 1954. We ain't going to hurt you.

1954's the year that Mr. Boeken picked up that first cigarette out of a bucket — out of an ashtray, a butt out of an ashtray.

And then starts these commercials here and these advertisements here. And after the break, I may pull [5932] out a couple and flash them at you, and I may not. I'll flip a coin.

But there's an amazing thing here, ultimately. These guys — and it may just be a coincidence. We've heard about Mr. Boeken and the way he presents himself and what his step kid thought about him, what his wife thought about him. Big, tough, well built, construction guy, outdoor guy, tanned, Harley, strong, in shape, guy's kind of a guy. Mrs. Boeken says, he was my Marlboro man. Okay.

Look at these guys. Tough, rugged, tough, anchors. They've all got an anchors tattooed on the back of their hand here. All of them. And then we get to this guy. Maybe the first known cowboy. And this guy is sitting there with an anchor on the back of his hand and a cowboy hat on. And Mr. Boeken winds up going in the navy and then buying his harley so he can get as close as he can to be the Marlboro man without actually having the horse.

This was him. This grabbed him. This was his identity. And you know what?

They've got great advertising. I don't fault them for it. But he bought into it hook, line and sinker. And we know that this guy here is 30 stories high in Hong Kong on a couple of buildings, and we know that this stuff here is responsible for the second greatest product brand loyalty there is after Coca-Cola. And Mr. Boeken went for this and bought into this entire thing.

So he became a Marlboro smoker, and he's always been a Marlboro smoker. And as time has gone on, whether [5933] it's red or gold or tan or platinum or ultra or whatever, it's Marlboro, Marlboro, Marlboro, Marlboro.

In 1957 was when he really started smoking. He was 13 years old when he started smoking, and he wasn't alone when he started smoking.

In these years here, '50's and '60's, according to a defense expert, up to 60 percent of the men in this country smoked. And you know, there was testimony in here about Eric Severeid, who was an extremely famous CBS newscaster who gave the news with a cigarette out of his mouth, on the tonight show and the today show and on and on and on.

For those of you who were born in another time and another place, This is the way it was. When the jury back then left this room for a break, everyone had a cigarette, or lots of people had cigarettes. That's the way it was.

So here we go.

By here, by right in here, according to Dr. Doll, and by right in here, according to Dr. Ludmerer, right in there, depending on the words they used, Dr. Doll, no reasonable scientist could say that there wasn't a link — or maybe it was Dr. Feingold that said that. But the handwriting was on the wall, huge, right in here.

Dr. Ludmerer says down here, there was a big consensus of scientific opinion. Whatever words you want to use. These are scientists now. These aren't people. These aren't people out in the open world. These are scientists. [5934]

So what happens to the manufacturer of these consumer products when it's put right in their face, you got a big problem here?

This is ten years after the Frank statement. Now, everyone's against you. What's up?

Denials and denials and denials. Then just — let this drop a little bit.

Then followed by — I guess we don't have — creating doubt about the health charge without actually denying it.

Mr. Boeken met a woman. Mr. Boeken liked the woman. The woman didn't like cigarettes. Mr. Boeken had a choice. Boy, she was a nice woman. There go the cigarettes. For how long?

Three weeks. And then the woman wasn't as important as the cigarettes.

Just remember one of those documents I read to, a Philip Morris document that said that the Nicotine is right up there with eating and copulating. Think about it. The Nicotine is right up there with eating and copulating; one of the necessities of live.

And so he quit for three weeks there. He quit because he wanted the lady more than he wanted the cigarette. And then after three weeks, he didn't want that lady anymore, and he wanted the cigarette more. He described his withdrawal symptoms, and they were classic.

One of the issues that I thought was going to occur in this case was a fight over whether or not Mr. Boeken [5935] was addicted or not. But that's a fight that didn't happen. Because the defendants' last accident expert witness said, I changed my mind. He was addicted.

In 1966, I think, the first warning labels went on tobacco. And it's important for all of you younger jurors to realize that during this whole time, there were no warnings. There were no warnings of any kind. There was nothing.

And right in here, the first warnings went on. And the first warning said, cigarette smoking may be hazardous to your health. May be. Surgeon general.

And then when we get up here into 1969, the second warning label goes on, and that warning label says, cigarette smoking is hazardous to your health.

Did everyone believe that?

No.

Was there a reason why everyone didn't believe that?

Yes.

Was it an accident that everyone didn't believe that?

No.

Was there a reason for creating doubt about the health charge without actually denying it?

Sure.

What was the reason?

Do you have this?

Can you hold onto that? [5936]

That is the reason.

Here's the roper proposal right here. Mr. Boeken had bronchitis starting when he was a teenager. Mr. Boeken would smoke cigarettes through his bronchitis. Some of us know how that is. Mr. Boeken wanted to be able to run. Cigarette smoking interferes with your ability to run.

Mr. Boeken didn't like the bronchitis, and he tried to quit here and he tried to quit here.

Did he know that smoking was bad for some sorts of his health?

Yes.

Did he know that it wasn't good for bronchitis?

Yes.

Did he know that it would screw up his ability to run?

Yes.

Did he believe it would kill him? No.

Did he believe it would cause lung cancer? No.

Did he believe it would cause serious illness and disease?

No.

Why not?

How could he be so dumb?

Well, he could be so dumb because he listened to them.

The incredible, unbelievable diabolical defense [5937] in this case is, if he listened to us, the hell with him. If he listened to what we said, the hell with him.

1980. Two things happen. 1980. He goes to see Dr. Trabulus. You're going to see Dr. Trabulus' records. Someone said there were all these things in the records about when the doctor told him to stop smoking. That ain't right. Look at the record.

But he saw Dr. Trabulus and he laid out his history, and I'm sure Dr. Trabulus talked to him about smoking. Mr. Boeken said in his deposition — quoted Dr. Trabulus as saying, I'm not going to tell you to stop. And Mr. Boeken understood that to mean, I'm not going to give you a lecture, but I understood exactly what he meant. And Dr. Trabulus told you, this guy was hooked.

At any rate, in 19 — meaning addicted. That because his doctors, his own doctors, saying, he is addicted.

In 1980, same here. He went to see Dr. Trabulus. He and his sister went and got hypnotized, and he stopped smoking for 35 to 40 days. And he could not maintain it.

And you know, I skipped a bunch of stuff here that we heard earlier. But here's one thing I skipped.

In the navy. '65 to '65. Vietnam war going on. Knee surgery — I'm sorry — leg injury. Out of the navy.

Hippie. Living in a van. Smoked some dope for a couple of years. Didn't like it. Made him tired. Made him eat too much chocolate. Gave it up. Said the heck with [5938] it.

1970, went north. Formed rock and roll band, which didn't happen. Injected himself with heroin. Very dangerous substance. In three months, he got scared to death of it. Now, heroin is an addictive, addictive substance. But he was scared of it. And because he was scared of it, he kicked it. And he went on a methadone program, and that methadone program lasted for approximately three years. Started in the San Francisco bay area, ended up at the V.A. on Sawtelle over in West L.A. And he kicked it.

He saw himself as drinking too much. He said on the videotape deposition he was never a daily drinker. I don't know how much he drank. I got no clue. Doesn't matter. He saw himself as drinking too much. And he went to AA. He went to AA to get clean and sober.

And in 19 — what was the year he was at AA?

1976, I think. Clean and sober. This guy hasn't had a drink, hasn't had any drugs other than prescription drugs or Nicotine for 25 years. Went totally straight. No one disputes that. No one disagrees with that. He's extremely proud of that.

He met his wife to be at one of these meetings. She made an interesting comment when she was up on the witness stand here.

When she found out — maybe through her own, I'm not sure — but when she found out that people were saying, Nicotine was a drug, it got her all upset because she had been clean and sober since 1976, and to think that she [5939] really hadn't been, that smoking Marlboros was taking drugs really upset her. And she testified here that when she was in AA, they never, ever told them it was a drug.

But I'd like to finish up here just before our break by quoting Mr. Boeken, Ms. Boeken, I think Dr. Benowitz, for this purpose: When you go to AA, when you go to alanon meetings, go to meetings where there are people addicted to substances, smoke, cigarette smoke, cigarette smoke, cigarette smoke, more cigarette smoke.

Mrs. Boeken talked about sitting outside of the meetings on a patio and smoking where you could hear the meetings through the windows. Through the open door. Her son testified when he was a little kid he used to go with his mom and step dad to AA meetings and everyone would be smoking. People that had kicked all kind of drugs, kicked alcohol, they were all smoking.

Dr. Benowitz testified about drug addicts getting off heroin, getting off other drugs smoking. Smoking. Smoking cigarettes. And so it's a strange thing, but these people who spent so much time and so much effort and give so much of themselves to get off of these substances, alcohol and heroin, and doing it successfully, kept smoking.

Now, why would that be?

Well, there's a couple of reasons, but one strikes me as far as Mr. Boeken is concerned.

He knew heroin was bad for him. He quit. There wasn't anyone out there that was saying to him, you [5940] know, what; heroin might not be so bad after all. We've run some studies. We know. We've got scientists. Heroin may not be so bad after all.

He thought he was drinking too much, and he quit that. And there was no one out there whispering to him, hey, it's not what it's cracked up to be, don't believe those people. There are other reasons.

But when it came to cigarettes, whether he was rationalizing things, whether he was telling himself stories, whether — as Dr. Benowitz said, an addict is someone that has to have something, and if there's a reason out there to justify it to himself or herself, they'll grab onto that reason — he bought their line. And he kept smoking. He knew it wasn't good for him, bronchitis-wise. He knew it wasn't good for him, running-wise. And he made continuing attempts to try to get off of it.

But as far as, you're going to be dead, he bought into this. And now when I'm done, there were certain burdens that I've got in this case, burdens of proof. We'll talk about that after this break.

But when I'm done and I sit down, I want to pass the burden onto Philip Morris, and I want to say, I want to hear, why in the world should he be criticized for believing what you told him to believe?

That if you went out of your way to create doubt about the health risk and he bought into your story, how in the world can you be hypocritical enough now to blame him for that? [5941]

Your Honor, do you want me to finish this chart or do what?

THE COURT: No. I think we really do need to take our break.

Thank you very much.

Ladies and gentlemen, we'll be back at 3:20.

Don't discuss the case with anyone.

Try to be back here promptly.

(RECESS.)

THE COURT: Our jury panel is back with us; counsel are present as well.

MR. PIUZE.

MR. PIUZE: Thanks.

(VIDEOTAPES BEING PLAYED.)

MR. PIUZE: Used to be that at night, instead of seeing ads for donating money to homeless shelters and giving free water to flood victims and doing all those great things, it used to be that every, single night when people turned on their television sets in this country, what you just saw — the white is the area that was not sponsored by tobacco.

And so if someone turned on their television set in the '50's or the '60's, tobacco commercials were everywhere all the time. It's a nice thing. It's good for [5942] you. Look how healthy it is. If you want to be a cowboy, et cetera. And you know what?

Good advertising is good advertising. But for those of us who have been brought up under proposition 99 or if we see alligators or see tobacco company executives smoking in the room, laughing diabolically —

MR. LEITER: Objection. Outside the evidence.

MR. PIUZE: Ms. Merlo talked about that.

THE COURT: Proceed.

MR. PIUZE: Mrs. Merlo said should she was one of them. The kind of warnings that out are there now.

Boom, boom, boom; don't, don't, don't, don't.

With respect to — And the kind of stuff that said do, do, do, do were everywhere all the time.

Look at — all the time. So that's when Mr. Boeken was brought up. Right there.

That's Philip Morris advertising. Just happened to be on a particular season —

(juror sneezes.)

MR. PIUZE: Bless you.

— 1963. And I find no fault with them advertising their product. I'm not pointing any blame at them for advertising their product.

But I'm simply showing all of you that Mr. Bocken, when he turned on his television, it was there. It was everywhere. It was in magazines. It was on [5943] billboards. It was on television. It was on everyWHERE.

And it wasn't warnings. It was, look at this great cowboy. Look at — I'm not going to show you all of them, but just a quick selected sample here that he talked about in his deposition.

Look at those guys. They're marines. They're the fighters. Yeah. Marines. That's what I like. He thought one of them might be John Wayne.

And we heard commentary on all of these ads from professor Goldberg about what they were designed to attract. And again, I find no fault whatsoever. I mean, if they're going after kids, I find fault. If they're going after adults, I don't find fault. But this is just to show you what he was exposed to.

And there are no warnings in any of these ads.

That's the only one I recognize for sure. Paul hornig. Notre Dame. Smoked Marlboros. Greenbay packers.

And then later, this.

And we heard from Mr. Bocken in his deposition that he had the jacket. He went out and bought the fringe suede Jacket. He did everything but buy the horse, because he couldn't have a horse. And he got himself, I think, a Triumph 650 over in England instead when he went to Europe in 1966.

And by the time he met his stepson, now he had a Harley. So he had his motorcycle, as I said, he said in his deposition, instead of a horse, but that's how he saw [5944] himself. That guy. Right there.

Strangely enough, his wife used to call him her Marlboro man. I mean, what is that message of that guy leaping over that fence?

It's not, you're going to get sick.

Now, it's okay for Marlboro guys to smoke light cigarettes. And gee, he did.

I'm going to get to light cigarettes in just a bit.

So anyway, in the 1950's and the 1960's when Mr. Boeken was a kid and a young man and a young adult, he didn't see what we see today. He didn't see negative, negative, negative, don't do it, don't trust them, don't believe them, alligators, smoke-filled rooms.

He saw cowboys, and he saw tough guys, and he saw people who said, you said it's cool and sophisticated. This is the way it is.

Someone here — it was professor, Dr. Ludmerer said, you don't want to be judging medical science by hindsight. And I asked him, is that true of regular human beings, too?

Do you want to judge regular human beings by hindsight?

And he said, it's not a good idea judging anyone by hindsight.

And so when the time comes for Philip Morris to say, tough — like Richard Boeken — tough luck to you, I ask you to judge Mr. Boeken not in hindsight, but I ask you to [5945] judge Mr. Boeken by the times that he was in.

And you know what?

I will extend the same; that's what's good for the goose is good for the gander courtesy to Philip Morris. Let's not judge them in hindsight. Let's judge them by what they knew at the time. So before I put this time line back up here, don't forget. This is what Mr. Boeken was doing. This is what the industry was doing. This is what knowledge was doing.

Let me just jump back a little bit, if I could, to Philip Morris.

Can we see there, too, the scientist and the executive, please.

1976.

(Videotape being played.)

MR. PIUZE: So that's the scientist.
Let's hear from the executive. '76.

(Videotape being played.)

MR. PIUZE: Two years earlier, two people over at the Lorillard tobacco company shared this confidential memo, which we've seen. This blowup is not going to be available. This will be in a much, much smaller size.

But i'd like to use a couple of your precious minutes and our precious minutes to discuss this. [5946]

1974 (paraphrased reading:)

The joint industry funded smoking and research programs have not been selected against specific scientific goals, but rather for various purposes, such as public relations, political relations, positions on litigation, et cetera. It seems obvious that reviews of such programs for scientific relevance and merit in the smoking and health field are not likely to produce high ratings. In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious strategy.

Four years later, Lorillard (paraphrased reading):

We have again "abdicated" the scientific research directional management of the industry to the "lawyers" with virtually no involvement on the part of scientific or business management side of the business. Lorillard's management is opposed to the total industry future being in the hands of the committee of counsel — [5947] counsel, as in good co-counsel, as in lawyers.

(Paraphrased reading:)

Lorillard's management is opposed to the total industry future being in the hands of a committee of lawyers. It's reminiscent of the late 1960's when the ramms group ran the tobacco institute, ctr and everything else involved with the industry's public

posture.

We heard — okay. That's Lorillard. So what?

And we spent a little time on the fact that Philip Morris saw it differently. Excuse me. This is '77. Right in between that period. Seligman and Osdene.

Osdene says (reading):

"It's my strong feeling that with the progress that has been claimed, we are in the process of digging our own grave."

Now, think about that. He sees honest scientific research as digging Philip Morris' own grave.

(Reading:)

"I believe that the program as set up has the potential of great damage to the industry, and I strongly urge that the [5948] whole relationship of our company to CTR be carefully reviewed. I'm very much afraid that the discretion of the working taken by ctr is totally detrimental to our position and undermines the public posture which we have taken to outsiders."

So this guy — you know, if Philip Morris wants to distance itself from him, a former top-ranking exec —

Philip Morris says, Gee Whiz, nothing like that happens here. But when the first of their scientific witnesses was here, I asked him if it wasn't true that right now out — this is a former Ph.D. chemist from Philip Morris saying he was told to destroy documents as late as — and he said, yeah, well, that's the allegation.

Anyway, whether they want to distance — whether Philip Morris wants to distance itself from this man, a very high-ranking responsible — we never heard he was fired. We never heard he was kicked out. We never heard he was denied his pension. We never heard anything about him,

except he's still around.

This guy says, honest science will dig our grave, and honest science is totally detrimental to our position and underlies the public posture we take to outsiders.

And so that leaves us, I think again — everybody, the court, counsel, ladies and gentlemen — I thank you for your patience here. But that leaves us with my [5949] last topic that I'm going to be able to get to today, and I promise I will finish as quickly as I can tomorrow.

This first one Dr. Hoshizaki did not agree to. So it's up there, but she didn't agree to that.

I made this little chart here showing what Lorillard thought of the CTR versus what Philip Morris thought of the CTR. And she pointed out, well, it wasn't Philip Morris. It was just Dr. Osdene.

I'd like to tell you in advance, this is before you ever saw, and certainly, before she ever saw, the memo that I showed you earlier where three Philip Morris high-ranking executives called CTR a front and a shield. That was their words. Philip Morris' words were front and shield.

But anyway, at the time and without the benefit of that information, either for her or the jury, this chart was set up, and it shows that Lorillard believed that the CTR was a political front, public relations front, a litigation front, and it was being run by lawyers.

On the other hand, Dr. Osdene didn't like the biomedical research that was being done there. And a question was asked, which was sort of — by Mr. Carlton on redirect examination — well, it really can't be both of those things at the same time, can it?

And you know what?

It can.

So the rough analogy — and it is rough — that I thought of is as follows: CTR is a cat. Lorillard is a [5950] mouse. Philip Morris is a Rottweiler. Now, when the mouse describes what a cat is, imagine what the mouse would say. But when the Rottweiler describes what the cat is, that dog sees the cat in a slightly different way.

Here, Lorillard — and I'm not here to praise Lorillard — but here, Lorillard, through its management, thought that the committee for tobacco research was a front, was a shield, was for political reasons, was for PR reasons, was for litigation reasons and was something cooked up by a bunch of lawyers who were running a company, running an organization, running the industry.

Philip Morris is in a totally different position. Philip Morris was a different kind of company, and Philip Morris saw it differently. And I'm sure as heck not here to praise Philip Morris.

Philip Morris saw it as something that threatened its position in the marketplace because it was doing honest to God research. And anyone in the mid '70's or earlier that was doing honest to God research was jeopardizing Philip Morris' financial position.

And I cannot put it any better than Dr. Osdene put it. Honest research digs Philip Morris' grave. Honest research is totally detrimental to Philip Morris' position. Honest research undermines the public posture that they've taken with outsiders.

One those outsiders that it took a position with is my client, Richard Boeken, who's dying of lung cancer — and he couldn't even stick around for oral argument [5951] here today.

So in 1977 — I got through the 70's when I stopped and I interrupted to show that chart. But in the 1970's, if we want to judge Richard Boeken and we want to find out why he did certain things, let's think about who was molding his thought. Let's think about who was putting thoughts in his mind, was channelling what was being done.

Philip Morris thought the truth would dig its grave. And you know what?

It would have.

And you know what?

I hope it does.

And you know what?

Tomorrow morning, I'm going to describe how it should be done.

Thank you for listening.

THE COURT: All right.

Ladies and gentlemen, it's now 4 o'clock.

We'll see you tomorrow morning at 8:45.

Try to be prompt.

(AT 4:00 P.M., AN ADJOURNMENT WAS
TAKEN UNTIL Friday, may 8, 2001 AT 9:00 A.M.)

[5952]

(THE FOLLOWING PROCEEDINGS WERE HELD IN
OPEN COURT IN THE PRESENCE OF THE JURY.)

THE COURT: Good morning, ladies and gentlemen.
Good to see all of you.

Good morning, good counsel.

All right, our jury panel is with us and we are ready to
proceed.

MR. PIUZE, your jury.

OPENING ARGUMENT (CONTINUED)

BY MR. PIUZE:

So this is one of the two longest closing arguments I
have ever given in almost 30 years of doing this. And on the
one hand, I apologize for the length of time it is taking, and
on the other hand, I made my decision that it is worthwhile.

And again, thank you for listening and thank you for
your attention today, yesterday, all the way through this
trial.

And this is my opportunity to now [5953]Thank the
Court, the staff. Great judge, great staff. So here we are.

Yesterday at the end of the day, I was going through
this time line. This will probably be the last time you see the
time line. So I would just like to start today by finishing it
up and I need Mr. Goldstein's help on that.

You have heard from various people, Mr. Boeken, his wife, Elvis Mendez, Dr. Benowitz, Dr. Beckson, the last doctor, and Dr. Trabulus, I think, about some of Mr. Boeken's attempts to quit smoking.

And yesterday we talked about this attempt here, for the lady, and we also talked about the fact that in 1974 and 1976, Mr. Boeken attempted to quit a couple of times and it had to do with bronchitis and his wind and his wanting to run.

I believe in that video-taped deposition, I haven't gone back and looked at it, but I believe he put some parameters on how long those quit attempts lasted. I may be wrong. But I thought they were a couple days apiece.

I don't know if that's of any significance, but this last witness, Beckson, said Mr. Boeken was a little vague on it.

I think he was asked about that by Mr. Carlton in deposition. I may be wrong. [5954]

In 1980, after he saw Dr. Trabulus for the first time and he was complaining again about bronchitis, Mr. Boeken went to a hypnotist with his sister. He stopped smoking for approximately 35 to 40 days. And now after more than a month of non-smoking, he fell back into the pattern of smoking.

I tell you that Mr. Boeken, as we all know, is able to quit heroin, which he knew was bad for him, he was able to get off of methadone, he was able to quit alcohol, because he thought that was bad for him, and he was never able to quit cigarettes.

And I think the prime question is, if heroin can be quit, why can't cigarettes be quit?

There was testimony here from Neal Benowitz and at least one of these documents that will be entered into the jury room that quitting nicotine is as hard as quitting heroin or one of them said maybe harder.

And certainly Dr. Benowitz told you that he has treated addicts up in San Francisco at the general hospital where people have been able to get off of heroin, off of coke, crack, stuff like that, but not off cigarettes.

I think the reason that Mr. Boeken is able to quit two substances and not the third [5955] substance is simple, he does not perceive the third substance to be as harmful as the first two.

Heroin, illegal. Heroin, can kill you, like that. Heroin is a bad thing. And Mr. Boeken, as a young man, who wanted to be a rock and roll drummer, in a different time and a different place in our society, experimented for three months. He chickened out in a big hurry. For three months he said this is not for me. I am afraid of this, I want out of this.

He stopped it. He went on a methadone program.

And after approximately three years from '71 to '74, he got himself off of the methadone program and was clean.

And in 1976 he went to A.A., got himself off of alcohol and was sober.

And since 1976, he's been clean and sober.

He perceived those two things to be a big risk for him.

He did not perceive cigarette smoking to be as big a risk for him.

And the issue in this case, of course, and the issue in this case is, why?

Well, there weren't any people out there from the heroin manufacturers' association saying, hey, this stuff isn't so bad for you, this [5956] stuff really won't hurt you. Hey, we are going to create a little doubt about this in your mind so you are going to keep using it.

And similar, there was no one from seagrams and there was no one from miller, which Philip Morris owns, giving messages like that. There was only one group that was giving him messages to keep him in. And there was only one group that was giving him messages to keep him interested.

This stuff isn't as bad as they say.

We are not really sure it causes cancer. There are plenty of other causes of cancer and as recently as within the last two weeks, you all heard a biologist up here who has had her research funded by the tobacco industry saying we don't know what the causes are. 80 percent of people don't get it.

Why don't all these smokers not get it, why do some people who don't smoke get it?

The same old thing that we heard again and again and again and again.

Anyway, Mr. Boeken, in 1980, went to see Dr. Trabulus, first time. There's a big note in Dr. Trabulus's notes because it's a first visit. He lays out his history. Here's what I did for a living. I was a construction worker. I did [5957] these things. Here's my history.

I used to drink, I don't drink any more. I used to do this drug. I don't do this drug any more. I do smoke.

And after that, he quit. And he failed.

And two years later he tried to quit again and failed.

One, two, three, four, five, so far.

In 1984, the tobacco industry goes to Congress and gives them a document which I have already showed yesterday which you are going to have in the jury room, and the tobacco industry tells the United States Congress, and the world, we don't know that smoking causes lung disease, we don't know that at all.

It's all up in the air, nothing is proven, we don't know anything.

It was a lie. It wasn't wrong, it wasn't a misstatement, they didn't just happen to be off on that. It was a flat out lie. And that's why I spent all that time with all those documents yesterday to show you what they knew what they knew, what they were saying behind closed doors and why they were going to do it. They lied.

Now, Mr. Boeken joined smokers anonymous twice in here in the late 1980's. [5958]

And on those two occasions, I don't believe on those two occasions that he ever actually put the cigarettes down.

He went to the meetings, and he listened and I think he went with his wife at least one set of meetings, but he never put the cigarettes down.

He was getting ready, he was getting ready, he was getting ready and he didn't.

In here, we start red, and we go gold, and we go a different kind of gold, and finally way up here at the end, this is ultra lights, we go platinum.

And he smoked down, just like the millions and millions and tens of millions of other people in this country, because he thought these things weren't as bad. Low tar, whatever tar is, can't be good, low tar, everyone advertises it, I am going to go with it.

So he goes down, down, down.

I am going to talk about low tar as soon as we put this board down.

In 1994, that's when Campbell got up and we have seen him at least four times during this trial. He's the guy who winds up with that little smirk on his face, what are you going to do about it?

What are you going to do about it [5959] Congress man Waxman? What are you going to do about it?

There's something on here, something not on here. I will just remind you that according to Dr. Sam Hammar, in 1989 is when Mr. Boeken had cancer, and the dye was cast at that point.

No one could know it. It's no one's fault that no one knew it. It's no doctor's fault that no one knew it. It is just the way it is.

The cells start dividing, the cells get screwed up. It takes a long, long, long time. And on doubling time it took ten years before it actually showed up on an X-ray.

And this was caught early. Mr. Boeken's was caught early.

But the dye was cast back here in 1989.

So this plays out with this guy and the seven C.E.O.'s in front of Congress.

And then we get to 1999 here. It's sort of ironic, and two things happen in October of 1999, Philip Morris puts on its new public face. One of the "L.A. Times" articles that I think you are going to see, and that I discussed extensively with Ellen Merlo, that's when Philip Morris came out and made it's public relations announcement, [5960] where we are no longer going to deny that smoking causes disease, they

didn't admit it yet, that took one more year.

But we are no longer going to deny it.

And that's when they put on their supposed new face, that's when they had a corporate new position.

There was no new science. There was no medical break through. No one came forward with them and gave them anything they didn't already know. They just took the information that they always had and said, gee, okay, but I want you to remember, the end of 1997, that's when they were put in the corner. And that's the settlement that Mr. Carlton — did they have a corporate change of position just because they were good guys, or did they have a corporate change of position because they had no place to go or did they have a corporate change of position for us?

Because you see, Ms. Merlo said, we test market everything, everything. We run focus groups on everything. We do public opinion polls on everything. We want to know what the public thinks about us. We go out and ask the people, what do you think about this, what do you think about that, what do you think about this, what do you think about that. [5961]

And so the change in corporate position at the end of 1999 was just that, it wasn't science, it wasn't medicine, they decided for some reason, either having to do with litigation they had been in or public opinion that they are going to put on a new face, new position.

Well, putting on a new face is putting on a mask.

So here we have the new Philip Morris starting in October of 1999.

And ironically one other thing happened in 1999 in October, Richard broken got diagnosed with lung cancer.

So the new face, the new position, all that new stuff was too late for him by ten years. And if 400,000 people a year, it was too late for that 400,000 people by ten years.

Finally, here, in the year 2001 — the president here is Harry Truman. The war in Korea hasn't started. No one has television in this country. Forget cell phones and faxes, no one has television in this country.

The Dodgers are in Brooklyn, the Lakers are in Minneapolis.

The Ramms, Cleveland.

50 years. It took them 50 years for a consumer product company that sells stuff to people to be put into their bodies and it took them [5962] 50 years to come forth and admit what had been, by their own reckoning, by their own expert's reckoning, a consensus of science and medicine since 1964 in January. So that's 35 or six years' worth of lost time.

But as I tried to point out yesterday, and I will say one more time, if there's a question about a consumer product, be it a firestone tire, be it bad cheese, all consumer product companies, they don't wait — they take it off the market — until it's tested and you know it's good, they don't wait until it is proven bad.

What Dr. Farone said, among other things, over at lever brothers where he was the year or so before he went to Philip Morris, that's a consumer product company, he was either the chief chemist or one of the chief chemists there, he was in charge of safety there, they tested everything on animals. Shampoo, toothpaste, anything that people are going to breathe, anything that was going to go in people's mouths, anything going to touch people's skin, they tested that first on animals.

The tobacco industry here did not test its products. It didn't test its product on animals.

The gentlemen's agreement which I am going to just touch on a little bit when I put [5963] this chart down here, the Gentlemen's Agreement called for any kind of biological testing to be done overseas where it was out of reach of the U.S. Government.

The Gentlemen's Agreement called for the tobacco industry and Philip Morris, as part of the tobacco industry, not to conduct any kind of testing here on our shores.

Some of these companies cheat a little bit among themselves. So, for instance, we know that Philip Morris was doing nicotine addiction tests with rats. They were breaking the gentlemen's agreement. But it was done in

secrecy there. The rats' cages were brought in in the darkness and covered up and it was a big secret.

But that still isn't cancer tests. That isn't biological activity.

And we know from the documents, we talked about yesterday, not only did they not test for cancer, they purposely had a company policy to avoid testing for cancer.

So here's a 50-year span, why do, why are companies supposed to use, it's not a government regulation, but it's common sense, why do companies use animals to test rather than people?

Because the companies don't want to hurt people with their product. [5964]

What happened here is that this turned out to be the largest animal experiment ever done, but in this test, rabbits weren't used, mice weren't used, rats weren't used, people were used.

And for us ex-smokers, people were used.

It is the — it's breathtaking to me that in the year 2001, when Philip Morris now has decided that they are going to admit that their tobacco causes cancer, look at the possibilities that opens up.

If we admit that, we can now test our products.

If they admitted that back in 1964, they could have started testing their products in 1964.

If they, in 1955, looked at this controversy and said, Gee whiz, our stuff is really hurting people, there are reputable scientists out there that say our stuff is hurting people, rather than hire a public relations firm, let's test this stuff.

Dr. Carchman — you had three spokesmen here from Philip Morris, Dr. Carchman sat up right there and said, to the best of my knowledge, we have never, ever once tested any Marlboro cigarette for biologic activity, meaning cancer, until within the end of 2000 or 2001. It's [5965] out of their minds.

It's an unbelievable thing.

And it takes my breath away when he says, yeah, now that we are testing this stuff, we have got to get people to sign off in advance.

Well, son of a gun, what about the 60 million American men that were smoking this stuff at the time, 60 million American men that were smoking this stuff, they didn't get anyone to sign off in advance.

50 years, so someone said here, I don't care what anyone said here, I am pretty good at math, take any one of those years, just in round numbers, 400,000 people, you take any one of those decades, 4 million people, you take any 25 year block of time, ten million people. It boggles the mind, boggles the mind. They didn't test their product, they avoided testing their products.

They gave up all of this time in which they could have, according to Dr. Farone, made a safe cigarette. Because he says, you can make a safe cigarette.

But they lost all of this time trying, because they didn't acknowledge there was a problem.

And if you don't acknowledge there's a problem, you can't fix it.

Six-year-old Richard Boeken. [5966] Ten-year-old Richard Boeken. Frank statement comes out. Your health is the most important thing to us.

13-year-old Richard Boeken gets hooked on nicotine.

And the ride is on.

And he's just one of 10 million, 15 million, 20 million, however million.

Anyway, this chart is going to be put away now. I just say that this, in round numbers, that's responsible for millions and millions and millions and millions and millions of lost lives in this country, slow, agonizing, crummy deaths that cost a lot of money. Because instead of trying to fix the problem, the public relation firm is hired, and a strategy came that we are going to create doubt about the health charge without actually denying anything.

Okay.

1975, Marlboro, 85 is this.

"Marlboro 85 smokers did not achieve any reduction in smoke intake by smoking Marlboro lights."

How about that?

This is 1975, 26 years ago. Philip Morris knew that people that were going to smoke their lower tar cigarette were getting exactly as much tar as people that were smoking this [5967] cigarette. This, this, same.

Tar is bad; right? Everyone knows that tar is bad. Tar is the potential bad thing. Gee whiz, if tobacco does cause a problem, tar is the bad thing, so you know what we are going to do, we are going to reduce the tar.

Well, they knew something that the American public didn't know. And what they knew is that by reducing tar, you don't reduce — excuse me — they knew that by giving you a light cigarette, you don't reduce anything.

Who told you that? Dr. Farone.

Dr. Benowitz, Dr. Doll, Dr. Strauss, Dr. Carchman, I believe, testified to that.

And what happens as a result of this? Why does that happen? It happens because of something called compensation. Breathing in more deeply, taking more puffs, inadvertently covering up the holes.

What's happened as a result of that?

A brand knew kind of cancer of the lung which was almost, which was very small potatoes—30 years ago, adenocarcinoma, that's what Richard broken has.

Went from being a small little percentage of the lung cancers to being a huge [5968] percentage.

Adenocarcinoma floats out in the lung, as you inhale the stuff more deeply to get your nicotine, it goes further into the lung.

And you had the string of really, truly, excellent, word class doctors in here to explain that the current medical thinking is, people smoking those light cigarettes inhale way more deeply in order to get the same amount of pleasure, the same amount of nicotine, and wind up getting just as much of the bad stuff and they get it in a different place, further out in the lung.

Lung cancer used to be more central before light cigarettes came along.

Now, one of the witnesses in here was — a question to Dr. Farone, I believe, it started this way, by Mr. Leiter was, well, that's no secret, government has known that for 20, 30 years.

That's true, government has. That is.

That's no secret, industry has known that for 20, 30 years.

For sure.

It's only a secret from the people who used it.

And the people who smoked down over the course of time, because these things were [5969] perceived to be milder, because they were perceived to be less harmful, or because they were perceived to be whatever, they are all wrong.

The government knew, Philip Morris new, tobacco industry knew, the only thing, the only people that didn't know were the people that were using these cigarettes.

And this information has been out there for at least 25 years now. I think there are earlier documents that show this.

Well, what about this?

One of the causes of action here has to do with a failure to instruct, a failure to instruct on how to use a product.

If these things really were for lower tar, shouldn't the consumers have been told when these things came out, when they came out in the '60's, shouldn't the consumers have been told, hey, if you are going to use these things, watch where you put your hands. If you are going to use these things, don't puff so deeply.

If you are going to use these things, don't puff more often.

If these things are going to be of any value, I mean, if you are going to bother using these, instead of these, you have to smoke them in a different way.

Everyone new, except the consumer. [5970]

And so one of the claims in this case is that Philip Morris, when they marketed these cigarettes, should have told the consumer what Philip Morris knew and what the government knew.

And they should have done it when these things first came out in the '60's. And it doesn't matter, in this case, that Mr. Boeken didn't start using these things until the '70's, because if that information had been put out, and if that information had been put out commonly, at least everyone would have known what they were doing when they bought these things. That was never, ever, ever done.

The second claim in this case is what's called a failure to warn.

The failure to warn only applies before 1969 on July 1st.

I say, I am going to quote Mr. Boeken, if someone — I asked him a question in his deposition, and in the deposition — I knew the deposition would probably be played at this trial. So if you ever get to rewatching that, and I am not suggesting you do, if you ever get to rewatching it, the part this comes in is where I am asking the questions at the beginning.

The question is, if someone had told you, really, the manufacturer had come up to [5971] you and said, forget this creating doubt stuff, forget this, it hasn't really been — forget this, it really hasn't been proven wrong. It really hasn't been proven that this causes disease. It really hasn't been proven that this causes cancer. There is substantial doubt.

We have got great scientists who say this is wrong. We have got great doctors who say this is wrong.

There are many causes of cancer. It could be the tar, it could be the smog, it could be your genes, it could be you're genetically disposed, it could be stress, and all those things we heard about.

If, instead of saying that to Mr. Boeken, what if the manufacturer of Marlboro had said, listen, no B.S., this will kill you. No joking. This will kill you. Would you have quit? This will kill you.

His answer was yes, but I have got a better question.

What if they had said that in 1956, before you started smoking, what if they had told America, in 1955 or 1954 when this research was all over the place, this stuff will kill you, well, they wouldn't be in business today.

We wouldn't be here today and Mr. Boeken would be going on about his business [5972] today along with about 15 million other people in this country.

So there is a failure to warn in 1954, '5, '6, '7, '8, '9, '60.

Don't forget, ever single day, along the line, a couple thousand kids, 13-year-old kids, 14-year-old kids, kids that don't know any better, kids that want to be cool, kids that want to be like their parents, every single day, along the line, from '55, 2,000, 3,000 get hooked on cigarettes.

On Monday, January 1st, 2 or 3,000, Tuesday; January 2nd, another 2 or 3,000. And February, we will go to 1953, '4, '5, '6.

1963, maybe 20,000 kids get hooked in a week.

No warnings. No warnings. No warnings. No warnings, nothing.

And 1964, when the Surgeon General made his report, there were still no warnings of any kind for two years. And when that warning went up, and you know, I guess the Surgeon General just doesn't get to write exactly what he wants on the warnings. I'd like you to remember that the committee that was chosen to do the Surgeon General's report, they weren't just big time scientists out there. Couldn't do that. Had to find people that hadn't expressed an opinion yet. [5973]

See, the top scientists that had been working in this field and that had already come to the conclusion that tobacco caused lung cancer, they were kept off the Surgeon General's panel.

The only people allowed on the Surgeon General's panel, because there is a little input there, were people that were totally neutral at that time.

Well, in the same manner, when those warnings went out, the only warnings didn't say, dangerous, they said may be. And that reflected the controversy of the time.

That was 1966.

And 1969, there was a cave of sorts. And in 1969 was the year the stronger warnings went on.

And in 1969, right after that that's when the television shows stopped. That's when the ads came off of television.

That's when a lot of stuff changed.

But between 1954 when all of this information had been amassed, and 1969, 15 years later, tremendous, I mean, think about it, a couple thousand kids a day getting hooked, unbelievable. People got hooked and stated hooked.

So another, another issue in this case is a failure to warn, and that goes right up [5974] to July 1, 1969, and ends right there.

And I say that if these things, if the industry had come out, and instead of dueling with government, instead of creating doubt, instead of undercutting the Surgeon General, instead of B.S.'ing the populous, said, yeah, like they have now in the year 2001, yep, we did it, it's right, it's true.

I am saying to you that Richard Boeken, and untold tens of millions of other people would never have smoked.

Now, another cause of action on this case has to do with flaw.

I put some of these jury instructions up there yesterday. There are a lot of different kinds of fraud. They all fit. I am not going to do it again.

This law here that we have got is called the common law and I'd like to think it comes from common sense. It's distilled from maybe 300 years, starting in England, distilled over a period of time. It sort of change with the times.

But I think if we just think of it, common law, common sense, it's a way to go.

So Dr. Cobb Hoffman, I think, hadn't heard of the scorpion and the frog and so I am going to tell you about the scorpion and the frog. [5975]

The frog was taking it easy, minding its own business on the side of the river, stream, not hurting anybody.

And the scorpion approached, and the frog was a little apprehensive.

The scorpion says, "How about giving me a ride to the other side of the stream?"

The frog says, "Now, why would I do that? You are a scorpion, you could hurt me."

The scorpion says, "Yeah, but I am right here, right close to you, I am not hurting you. I could hurt you and I am not hurting you, so I am not going to hurt you. Don't worry about it, give me a ride across the stream. I can't swim. You are frog, you can skim. I am a scorpion, I can't swim. Give me a ride over there."

"I don't know about that."

The scorpion said, "Listen, you are going to give me a ride. I can't swim. We are going to be in the water. I won't sting you, I will drown. Give me a ride."

The frog says, "What the heck, it sounds logical to me."

The scorpion jumps on the frog's back. The scorpion can't swim. He wants to get across the river, the stream. The frog gets him to the other side. The scorpion stings him. The frog is dying. He can't believe this. He said, "what [5976] the hell did you do that for? I gave you a ride, you promised me."

He said, "I am a scorpion."

Now, that's what the defense of this case is. Philip Morris admits it has sold a dangerous product here in this country for over 50 years. Philip Morris admits that its product makes people sick. Another one of its corporate faith, Ellen Merlo, had a little bit of trouble. And I am sure you all remember that, when I said, well, okay, your product is dangerous, yeah.

Your product makes people sick, yep.

Your product kills people. And she went (indicating), because she forgot there was the new script. This was the new Philip Morris. This was the new story. And she took a long, hard, long pause and went, "Yep, right, it kills people."

All right. Well, read some of these jury instructions. You have a product that kills people.

Now, Mr. Boeken was reassured by them, again and again and again that they didn't know this was dangerous. They didn't think it was dangerous.

Here is an open question, medical research was open, doctors disagree, scientists disagree, it could be the tar, it could be the [5977] cars, it could be the air pollution, it could be the stress, it could be the genes, it could be something

about you, we don't know this for sure.

So Mr. Boeken is on the other side of the stream almost, just like that frog, and Professor Cobbs Hoffman says, anyone that trusted those guys are stupid.

And it sort of reminds me of the scorpion saying, hey, tough luck, Charlie, I am a scorpion, tough luck.

Well, on behalf of the frog, here's what I say. The frog is an innocent bystander. But if there are people and some of you may be those people who think, you know what, maybe Professor Cobbs Hoffman was a little blunt about it but maybe there is something to what she is saying, maybe people should have known, maybe people should have, when they heard a chief executive officer of these companies say something, maybe they should have said, B.S.

Or maybe when they bit for the disinformation, they should have been a little smarter, all five million, ten million, twenty million, however many of the — I think there are forty million people now. Okay, so maybe some of you think Mr. Boeken wasn't cynical enough and maybe some of you think Mr. Boeken got blinders on, which he may have. And I acknowledge that. I [5978] acknowledge that some of you may think that.

And so I say to you, if that frog wasn't the smartest frog in the world, does that mean the scorpion wins?

Or does that mean, okay, the frog, he might have been partially responsible, but that scorpion, that scorpion can't escape responsibility.

So take a look at this, please. This is a jury instruction. The judge is going to read it to you. It's going to go in the jury room. You are going to see it and this is what causes, what's the cause of damage? What's the cause of an injury?

The law defines cause in its own particular way.

"A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm."

Substantial factor.

And this is the next instruction.

And for those of you that think, if any of you do, that the frog should have known better, okay.

"There may be more than one cause of an injury. When negligence or wrongful conduct of two or more [5979] people or negligent or wrongful conduct and a defective product contribute concurrently," at the same time, concurrently, "as causes of an injury, the conduct of each is a cause of the injury, regardless of the extent to which each contributes to the injury. A cause — " this is legalese. I apologize for the people that wrote this next sentence. "A cause is concurrent if it was operative at the time of the injury and acted with another cause to produce the injury. It is no defense that the negligent or wrongful conduct of a person not joined as a party was a cause of an injury."

So here's the translation. If two people — don't forget, Philip Morris is a person in the eyes of the law, Philip Morris corporation, person in the eyes of the law. If two people, for those of you who think the frog should have known better, if the frog should have known better, the scorpion doesn't win, the scorpion stays.

Now, you will not be instructed anything about Mr. Boeken's negligence. There will be no instruction about that because Philip Morris — [5980]

MR. LEITER: Objection.

MR. PIUZE: Correct me if I am wrong.

MR. LEITER: I am asserting an objection, your Honor.

THE COURT: Just one second.

Excuse us, ladies and gentlemen.

As you know, this doesn't happen very often.

(A DISCUSSION WAS HELD IN
CHAMBERS, NOT REPORTED.)

THE COURT: Okay, ladies and gentlemen, just take a deep breath and imagine that never happened. Okay.

MR. PIUZE.

MR. PIUZE: That never happened.

Philip Morris does not claim Mr. Boeken is negligent. Philip Morris does not claim that Mr. Boeken was negligent.

So back to this instruction.

Even though Philip Morris doesn't claim that Mr. Boeken was negligent, even though they don't even make that claim, I am showing you that because if the frog was partially responsible for its getting stung, because the frog was trusting, the scorpion does not get off the hook. Because if two different people, Philip Morris and [5981] Mr. Boeken, the scorpion and the frog, if two different people or if two different scorpion and frog, animals, are responsible at the same time for what's going on, they are both responsible.

And this Instruction, 377, tells you that.

It tells you that if any of you think that Mr. Boeken, like the frog, was too trusting, if he, if we want to adopt a lighter version of what Professor Cobbs Hoffman said, that, you know, instead of saying, in effect, who in the world would trust these bozos, who in the world would trust these bozos, if we take a watered down version, a lighter version of that, and we say, you know, maybe they weren't telling the truth, maybe we should have figured out they weren't telling the truth and if you think that applies to Mr. Boeken, okay, that should end it. But that doesn't deprive him of compensation.

Because just like the scorpion, Philip Morris doesn't walk, if someone was gullible enough to believe, and I say, from a moral point of view, let's stop there for a second too, I'd just like to take maybe a minute or two on this, still with Professor Cops Hoffman.

I hope, I am not going to come back to this again. But I hope, truly, even putting, even putting this case aside, I hope, truly, that [5982] it hasn't come to that, that we can't trust anything that anyone says about anything any time, any place, anyhow.

If Mr. Boeken was too gullible or if Mr. Boeken was so addicted that he rationalized, that he would grab onto what

they told him, that he would bite for this, hook, line and sinker, that doesn't eliminate him from compensation in this case at all.

I read some of these memos here. They are so cynical. And I see it like, one in particular yesterday that said we are going to target this to tobacco state congressmen and to heavy smokers.

This is the Roper proposal, Exhibit 330, Roper proposal, we are going to target tobacco state congressmen and heavy smokers.

And I see it as a fisherman throwing, throwing a bunch of lines overboard.

And some of the fish are going to bite and some of the fish aren't going to bite.

And so here's the fisherman throwing the line overboard, and for the ones that bite, the fisherman, in this case, Philip Morris, says, dumb S.O.B., you don't deserve anything, shouldn't have bit.

So I think I am done with that. That's what causes, there can be more than two [5983] causes going at the same time.

And now another issue in this case, another legal issue in this case here, another theory has to do with design defect.

And this is what's known as product liability, sometimes strict liability.

Here's a little bit of legalese but I would just like to go through it with you quickly.

And let me say something else if I could.

The judge will tell you about burden of proof. He might have mentioned it earlier in the case.

But there is such a thing as burden of proof. I have watched some of you ladies sitting out on the bench there and right above where you have been sitting every day is this seal. And it's got Lady Justice up there.

And Lady Justice has some scales in one hand which I want to talk about now. And Lady Justice has a big old sword in the other hand which I want to talk about in a little while.

But the scale of justice, the burden of proof, here's how I visualize it.

Everyone starts out even. And this is a civil case right here. It's not a criminal case. [5984]

And in a criminal case, in the United States of America, when the prosecutor who sits over here, stands up, and he is trying to put someone or she is trying to put someone in prison or take their life, the burden of proof is beyond a reasonable doubt. And the way I visualize this is sort of 99 to 1, like that, beyond a reasonable doubt.

This is America. Life, liberty, pursuit of happiness. Life, liberty, more important than property. Life, liberty, most important. If we are going to take someone's liberty by putting them in prison, take someone's life, there better be darn well proof beyond reasonable doubt before you do it.

This is a civil case here. No one is going to jail. No one is going to prison. No one's life is being taken. No one is going to prison. There have been enough lives being taken already.

Maybe this will stop someone else's live from being taken.

But as the court will say, in a civil case, it's the preponderance of the evidence.

What it means is one side tips the scales a little, 51, 49.

So I have, on behalf of Mr. Boeken, the burden of proof on most issues in this case. [5985]

And the burden of proof is by a preponderance of the evidence.

51, 49. What is more likely than not.

None of this, no one is going to prison, no one is getting the death penalty. 51, 49.

There is another issue I am going to come back later on and say something different about, and that's the sword issue.

But on whether there was a fraud, whether Philip Morris defrauded, whether Philip Morris made false promises, whether Philip Morris concealed, whether Philip Morris was negligent, on the strict liability thing I am about to talk about, 51, 49, is it more likely than not.

So here it is. For Mr. Boeken, I have to prove that Mr. Boeken has to prove that Philip Morris was the manufacturer of Marlboros, that Marlboros possessed a defect in design, that the defect which — which I am going to talk about — that the defect in design existed at the time it left defendant's possession.

And what this one means is, you know, for some products we get them to our house and we alter them and modify them and do something to it and it changes them. We are talking about a straight cigarette right out of the box here. [5986]

That the defect in design was a cause of injury to plaintiff.

So let's stop there.

As it turns out, Philip Morris does not dispute, in this case, that Mr. Boeken's adenocarcinoma was caused by smoking the Marlboros, as it turns out.

Here's the pathology report. Papillary adenocarcinoma of the lung, moderately well-differentiated.

We had a little talk along the way about something called bronchioloalveolar carcinoma. But nothing ever materialized on that.

Every doctor in this case who came here said Mr. Boeken's lung cancer was caused by smoking cigarettes.

That included his treating physician, Dr. Sarna. Dr. Sarna just happened to be a full professor of oncology over at UCLA. It also included doctor — you know, these people that I had in here, these unbelievable great doctors.

Anyway, it's no dispute. The product caused the cancer.

Plaintiff's injury resulted from a use of the product that was reasonably foreseeable, smoking.

So of the one, two, three, four, five of the five issues, the only one that's going [5987] to be in dispute here is number 2, that the product possessed a defect in its design.

And what's that?

A design defect is one of two, A or B. It doesn't have to be both. It can be a, it can be B. It can be B. It can be A. It can be both. It does not have to be both.

"A, a product is defective in design: if it fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."

So let's stop there.

Let's just talk about A.

In 1954, when Mr. Boeken picked up that butt out of the ashtray, in 1957, when he started smoking, Philip Morris has said in its internet web, media press release, that Mr. Boeken should have known then, before he picked up that first cigarette. And I take direct issue with that.

And I will only take a minute to observe, I talked about it yesterday. It's a pretty amazing situation where they come in. We pions should have known all this stuff, but their scientists didn't have to know. Their doctors didn't have to know it. Their executives didn't have to know it, but we have to know it. Stupid [5988] beyond belief.

All the way from 1954, when he picked up that first puff, to 1957, when he started smoking, immediately went to two packs a day, or one to two packs a day, all the way up until 1964 in January — let's stop there. I am going to use their medical expert, Dr. Ludmerer. Dr. Ludmerer says, even smart, Ph.D., genius, professors, doctors, the best people out there, even they weren't supposed to know that this stuff caused cancer until January 1st, 1964 when there was a consensus.

So let's just use that for starters.

And I want you to just assume for a second that on January 1st, 1964, Philip Morris stood behind the Surgeon General and said, right, we ain't waiting for 2001, right, we agree.

For those years up until 1964, that product undoubtedly failed to perform as an ordinary consumer would expect because the consumer was plunking down his or her good money buying poison.

Now let's look after 1964.

Let's look all the way, I will give you another chunk of time, let's go all the way up into 1969 when a warning went

on there that says this stuff does cause disease, five years later. [5989]

For those five years, that product failed to perform as an ordinary consumer would expect when they smoked it.

And now let's take another block of time. And this block of time ended last year.

I don't know what an ordinary consumer is, but half the people haven't stopped smoking.

As long as there was doubt out there that was being created, as long as they were sending their executives before Congress, as long as they were turning in propaganda to the United States Congress in '84, as long as they were creating doubt, as long as they had Professor Hoshizakis around to say we still don't know, we still don't know if this really is true.

As long as there were doubts created about the health charge, nice way of putting it, the health charge, your life, as long as there were doubts caused about the health charge, I say that an ordinary consumer could expect otherwise.

But I can see where some of you will disagree on that. Next, different issue.

Up until six weeks ago, approximately, or eight weeks ago, ordinary consumers did not know that red equaled gold, [5990] equaled platinum. Ordinary consumers didn't know that. Ordinary consumers would expect and were led to believe, and did believe, that red did not equal these others, and that it was better to smoke these others, and it was always wrong from day one.

Now, if a product fails to perform as safely as an ordinary consumer would expect, when the cigarette is used in an ordinary, intended or reasonably foreseeable manner, we have just run the board and all five things have been established.

They were the manufacturer. It was defective. The defect existed when it left the factory in the package. It was a cause of injury to plaintiff. And the injury related from a use of the product that was reasonably foreseeable; namely, you lit it and smoked it.

And that's a wrap. Alternatively, and this is an alternative, we don't need both.

"A product is defective in design: if the risk of danger inherent in the design — excuse me — if there is a risk of danger inherent in the design which outweighs the benefits of the design.

"In determining whether the benefits of the design would outweigh such risks, you may consider, among [5991] other things, the gravity of the danger."

Well, you can't get much more grave than dying slowly and painfully from lung cancer.

"The likelihood that such danger would cause damage."

Well, the body count is 17 million people since 1964.

"The mechanical feasibility of a safer alternative design at the time of manufacture."

And that's where we are going to spend a couple minutes. I will come back.

"The existence or non-existence of warnings. The financial cost of an improved design, and the adverse consequences to the product and the consumer that would result from the alternative design."

The last thing, adverse consequences, and the mechanical feasibility go together.

I read you a portion of Dr. Farone's deposition yesterday where he said there can be a safe cigarette, there aren't any on the market now but there can be.

And I want to — this will either be the last or the next to last thing I read out of [5992] this deposition.

MR. LEITER: Page, please.

MR. PIUZE: 1520.

MR. LEITER: Thank you.

MR. PIUZE: Okay. He is talking about Potassium Nitrate also known as salt peter.

The NOD program, N-O-D, program that you heard about has to do with nitrates.

"When you burn that, it gives off oxides of Nitrogen, the stuff that causes the brown haze on bad pollution days in L.A. When you look out over the horizon, that's the nasty stuff we don't want.

"That stuff also reacts with nicotine in the smoke to make things called nitrosamines which are deadly carcinogens.

"So the idea was, if we removed nitrate from the sheet, this artificial reconstituted tobacco, and we used that in the cigarettes, that we could reduce the amount of bad stuff.

"In fact, we prepared some of that sheet. It was made into Marlboro type cigarettes and that's the only time in my eight-year career [5993] where I actually saw the result of a test on Marlboro was a Marlboro test run with the normal way we make it plus this modified, reconstituted sheet. And that was tested in Germany, as I understand it. There Dr. Osdene, who showed me a document, that showed that it was less carcinogenic.

The modification, that nitrate removed material, all of the nitrates removed. That was around 1979.

The modification was never put into effect.

And where he goes on to discuss why this testing was done overseas, because there was a gentleman's agreement that prevented them from doing it. There was also the idea that they didn't want the documents. He talks about sending home and destroying them.

"The document I just talked about where I said that I saw the result of the Marlboro versus — he took that document back from me and said I shouldn't have shown you this, I have to destroy it.

"And he told me his general policy was to have all the documents [5994] that contained information that they didn't want to be discoverable in the United States, was to send it to his house."

Anyway, there was a program, and the program was to remove this stuff that caused the brown haze over L.A. On bad pollution days, and it was tested time and Philip Morris denies the existence of this test and Dr. Farone says that reduced cancer in these cigarettes, Dr. Farone says, they could make a safe cigarette.

I talked about the Cambridge cigarette the other day. Just let me show you this little take. 30 seconds.

You are going to have an exhibit that shows where Dr. Whidby drew the Cambridge tar line at the bottom, bottom, bottom, bottom of the page. It was almost a submarine under sea.

You know my views on why they didn't try to build a safer cigarette, because a safer cigarette would kill the brand name.

Back to this jury instruction.

The second way of getting to dangerous and defective product, excuse me, defective product, is that if there was a risk of danger inherent in the design which out-weighed the benefit of the design.

In this one particular situation [5995] here, and only this situation, the defendant has, Philip Morris has a burden of proof in this one situation in the case.

The essential elements of a claim based upon a design defect from failure to warn, this is the third products liability issue.

Philip Morris was the manufacturer; namely cigarettes. Product was defective. The defect caused an injury to the plaintiff, and the plaintiff's injury resulted from the use of

the product that was reasonably foreseeable.

In this case, a product is defective if the manufacturer had a duty to warn of dangers and fails to provide an adequate warning of the danger before July 1, 1969.

And it goes on to talk about it. The product was defective under the law, under all three.

Under consumer expectation, it's a dead bang.

Under failure to warn, it's an absolute dead bang up until July 1st, 1969.

And the design defect, it's a closer call because I realize, this is the only thing that's contested.

They say they can't — they say they can't make a safer cigarette.

And my witness, who used to work [5996] for them, and was a high-ranking boss says, boloney.

And the quandary, because they wouldn't admit that this stuff caused cancer, they didn't do biologic tests, they lost 35 valuable years, minimum, testing this stuff, 35 valuable years minimum, gave up 35 years' worth of testing to make a cigarette safe.

And plaintiff also claims in this case that Philip Morris was negligent, and that's another reason why they are negligent because they didn't test.

Now, I want to talk about Mr. Boeken.

Here, in this high tech case of ours, here's Exhibit 80508.2, which you won't have in the jury room.

Dr. Doll's colleague, Dr. Peto, from Cambridge, England, has this chart in one of his latest scientific papers.

Dr. Feingold from Miami, drew this chart for you. It's right out of, I believe it's right out of Dr. Peto's paper.

And this chart shows what happens if you smoke and if you quit. And unfortunately, one of the things this chart shows is that if you quit, your risks of getting lung cancer don't go down, they stay where they were, when you quit. [5997]

But they don't go down.

And so, for instance, this 75, the end of the chart is someone who is 75 years old.

And if someone keeps smoking right up until the time they are 75 years old, their risk is higher than someone who quits at 65 or 55, or wherever.

But what happens is, when someone gets off the train, and someone quits, when someone can kick the habit, their odds of getting lung cancer do not go down. They stay where they are.

And that's not contested in this trial.

So anyway, not a nice thought.

But Mr. Boeken, if he had to quit in 1989, when he was 45 years old, he already had cancer. It was too late for him.

If Mr. Boeken had quit when he was 45, any time after 45, wouldn't have mattered to him, because he already had cancer. It was just a matter of manifesting.

People who got the message, as some of the defense witnesses say, and quit, are not out of the woods.

There's his tumor. Not very big tumor. Right upper lobe. That tumor metastasized. The medical care he got was absolutely fine. Some of the finest people in this city treated him, [5998] couldn't help him. Prolonged his life. And once that spread to his lower back, the handwriting was definitely on the wall.

When it was found that there were lymph nodes, right away, within the first couple weeks, he was told the lymph nodes were involved, handwriting was on the wall. Handwriting went to capital letters. And metastasized to his low back in August of 2000, and the handwriting became overwhelming, around November or December of 2000, when he was diagnosed with metastasis to the brain.

Here you go. And he had, unfortunately for him, multiple lesions in the brain. This is the common — we heard from Dr. Feingold and I think from Dr. Strauss and from Dr. Sarna. This is common. This is the way it works. Lung cancer is the primary cancer that's caused by tobacco smoke. Metastasizes to different parts of the body. This is one of the favorite places right here, to the brain.

And Mr. Boeken has brain cancer, low back cancer, lung cancer, and it's a fatal illness.

There is no cure. But he is being treated the best he possibly can be.

I'd like to spend some minutes — your Honor, just give me a clue, can we go to quarter off? Is this where we go to? [5999]

THE COURT: It's up to you. I am not putting any limits on either side. If you would like to take a break, we will do that. I extend the same courtesy to the other side.

MR. LEITER: thank you, your Honor.

MR. PIUZE: well, you are the jury, you got to vote, now or 15 minutes from now. Juror: do it now.

MR. PIUZE: your Honor, I think I would like to take a break now.

THE COURT: Ladies and gentlemen, take our break. Be back at quarter til 11:00.

(AT THIS TIME, A RECESS WAS TAKEN.)

(THE FOLLOWING PROCEEDINGS WERE HELD
IN OPEN COURT IN THE PRESENCE OF THE JURY.)

THE COURT: Mr. Piuze.

MR. PIUZE: Thanks.

OPENING ARGUMENT (CONTINUED)

BY MR. PIUZE: I am going to spend less than five minutes touching on a couple issues of liability [6000] and I am not coming back. Promise.

This is Dr. Farone here. He's commenting on that light cigarette exhibit I just put out. And he's quoting it.

"Marlboro 85 smokers in the study did not achieve any reduction in smoke intake by smoking a cigarette, such as Marlboro lights, normally considered lower in delivery."

He explains that. What does it mean?

"According to their human smoke simulator studies, according to the way people smoked, that smoking that red material, you get a certain delivery level. When you switch to the lower tar cigarette, the light, you didn't get — actually, the smoker didn't get less tar."

So that's Dr. Farone saying that.

And last, on this product here, this is the Cambridge cigarette, and that's measuring the bad stuff. Dr. Farone says, on page 1574 and 5, this was the first zero zero tar cigarette he had seen — excuse me. It was a project that was intended to make it as low as we possibly could, zero, zero, or 0.0. The code name for the project which became Cambridge was Trinity. [6001]

Some of the documents you had don't say Cambridge, they say trinity. So when you see trinity, Cambridge.

The tar is the bad stuff?

"No tar, no carcinogens."

"No tar, no carcinogens. Nothing to attack the lung tissues."

And then last, I mentioned the defendant in one situation here, Philip Morris has a burden of proof. And that comes about as follows: we don't have a final prepared instruction for you to put up there.

But it comes out as follows: under strict product liability, I went through three different subsets, strict products liability, consumer expectation test, it doesn't work the way it — it doesn't work as safely as an ordinary consumer would expect.

But the warnings were inadequate, and that the instructions on how to smoke a light cigarette were inadequate, that's it, they don't have the burden on that.

But the third one had to do with the risks of the product outweighing the benefits. The risks, excuse me, the risks of their design of the product outweigh the benefit.

And in that case, I went through five, I think, five elements with you. And if the [6002] jury finds that on those five elements, the plaintiff has met his burden of proof. And in that one instant, the burden then shifts to Philip Morris.

And in that one instant, Philip Morris then has to show you that the benefits of the product outweigh — the benefit of the cigarettes out-weighed the danger inherent in the design.

So I covered that, they can talk about that more if they want.

Now I am going to talk damages and there are two different, two different issues that I am going to discuss. One is to compensate Mr. Boeken. And it's called compensatory damages. And the second has to do with punishing and making an example of Philip Morris and that is called punitive or exemplary damages.

In this particular case, we had a lot of testimony from Mr. Johnson and, I think, maybe Ms. Merlo too and some of the other from Philip Morris about Philip Morris's financial condition.

That only has to do with punitive or exemplary damages. It's got nothing to do with compensatory damages.

And I think I'd just like to make it clear that when we are talking about [6003] compensatory damages to compensate Mr. Boeken, the wealth of Philip Morris is not an issue. And the fact that Philip Morris is richer than Mr. Boeken is not an issue. It's not an issue.

These are both people in the eyes of the law. And when it comes to compensation, Mr. Boeken should be compensated whether it's Lorillard, a little company, or Philip Morris, a big company. That doesn't matter. Compensation has nothing to do with the wealth of the defendant.

Having said that, Richard Boeken is sort of my age. He's sort of from my era. He sort of went through experiences that we heard from Professor Cobbs Hoffman here, went through some unique times.

I'd like to tell you my view of Mr. Boeken.

World War II is coming to an end almost exactly at the time he was born.

He grew up in the post World War II era.

What our country and the world had been through, the entire world at war was a huge thing. And the image of the military, you saw this marine poster that he liked. He said the marines were the elite. That's it. That's what young kids grew up with.

And the idea of a tough, resilient, [6004] independent, strong male, I know, nowadays, we are supposed to be more sensitive. But the idea back then was tough, independent, resilient. And that's how he saw himself. He was a child of his times.

And you can see it in his actions. And you can see it in what he chose to do, and you can see it in what he did.

He was into weight lifting. He was into physical condition.

When it came time, there was a war going on. He joined the military.

His stepson, when he came in here, said, you know, my first recollection of the guy is that he bought me a bird and a dog and whatever, something else.

But besides that, he was a big, strong, tough guy who liked to be outside. He was tanned. He worked with his hands. He was into construction. When we did things it was always outdoorsy. When we did things, it was camping. When we did things, it was going up to the mountains. When we did these things, it was outside, out.

Anyway, not only for the purposes of my talking about the liability issues in this case, was he like the Marlboro man, he was. He enjoyed being outside. He enjoyed his body. He enjoyed being strong. He enjoyed this masculine [6005] thing.

Mr. Boeken never got any college degree. He never got any associates degree. After he got out of high school, he stopped going to school for quite a while. Then he checked back in and took some junior college courses. No degree of any kind.

He worked for Hannah Barberra as an illustrator. He saved a bunch of money and joined the crowd in his era, and when he couldn't stay in the navy because of a leg injury, he went out and became a hippy for a couple years.

He went through that phase, got through that phase, got through some hard times, and showed strength of character, resilience, toughness, kicked this drug, he kicked alcohol, and something he is immensely proud of.

While he was at A.A., he met Judy. It was interesting to hear her talk from a woman's perspective about, well, what she saw, what she liked, why she decided to have a child with him. She wanted to be sure that this would really, really, really, really last.

But traditional, good provider, worked hard, had his own construction business, went on from there, worked for his father-in-law selling women's hosiery, didn't work out.

Got into this business leasing oil [6006] and gas stuff.

We heard more about the business, I think, from his buddy, Elvis Mendez, than we heard from him. But he's done really well at it.

So here's a guy who was tough, physically, was resilient, was a hard worker, was a good provider, all of the things that hopefully we tell our kids that they should be.

His life expectancy as a normal male in our society is 21.4 years from today.

That's, of course, if he didn't have this disease.

And, of course, he's not the majority.

But the compensation in this case is going to have to compensate him for the loss of 21.4 years into the future as well as what he has been through. So there are three categories of compensatory damages. One, medical expenses. You are going to have the medical bills. It's about 270,000 bucks.

Second, his loss of earnings and earning capacity, not quite as easy.

You are going to have Mr. Boeken's tax returns. You are also going to have Mr. Boeken's, a couple documents out of a bankruptcy petition.

And in that document for the [6007] bankruptcy petition, it states what his income was for a couple of years when we don't have tax returns for.

So in other words, I don't know the exact years but you look in the bankruptcy papers and it says for year "X," here's what I made, year "Y," here's what I made. And then after that, for most of the years, there are tax returns.

So you look at that stuff, and we had, I had my own accountant came in here. And I also had Elvis Mendez come in here. Mr. Mendez for a couple reasons, but right now for the reason I am about to describe.

There were two years in there with the tax returns. You will just see them. Just lay them out and these two stand out like sore thumbs. Because most of these tax returns are like 220,000, \$237,000, \$225,000. And it's all in that range right in there.

One of them, I am not positive, but I think it's for '96 is \$100,000.

So Elvis Mendez was in here. They used to work together. They started out at tease same companies when they got into this oil and gas leasing and oil and gas well investment. And they both went out on their own and they both started their own companies and they are buddies.

They tried, you know, they have [6008] gone as far as to go together to look at office space together because they are thinking about if not partnering up, at least share space. And although they walked right up to the edge several times, like up to the alter, they didn't do that. It just didn't happen.

But they are ~~the~~ the same business. They fly down to Texas together to look at these wells. They go to vegas together to go to computer shows and stuff like that.

Elvis Mendez said that they both got into a deal and they put their investors into a deal in order to invest in A.T.M. machines. And the deal went south. It didn't work out. There was a lot of money lost.

Now, these investors have to be kept happy.

And so both Elvis Mendez and Richard Boeken decided they would make the investors happy by eating these losses.

And Elvis Mendez said, and I am not positive now, but there's a transcript if you want, but he thinks it was around '96.

I am just simply telling you that if Mr. Boeken lost money on A.T.M.'s and he decided to eat the losses, fine, that's good. I am not asking for any compensation for that.

I am simply explaining why that one [6009] year was a down year.

So one of those two years that stood out, invested in A.T.M.'s, turned out to be bad. They didn't want their investors to eat it. So they agreed to eat it themselves.

And then the second year was 1998.

And in that year, there was a tax return for, you know, it's — you will see it, it's like 70,000 or 37,000. But it's way above. And it didn't look right to me. And that's when I asked Burney Lewak, the evidence is here that he's my personal accountant. He did a favor, tax season, to go through all this stuff and find out what's what.

And he went through all the boxes and he did all the stuff and he came in here and he told you what he thought the income, the real true income was and that it was going to be filing an amended had return and it was, it was like \$170,000.

What you want to do with this set of facts, I am not quite sure.

When Doctor Formusis, he's the economist, came in here to give a bottom line number, he took all of the figures right off of the papers, all the tax returns, the year he made 100,000, that's what he made.

And all the other years he took [6010] them right off the tax returns except for one year and the one year he didn't take it off the tax return was the year that Burney Lewak talked about.

To me, it's not a major issue if Mr. Boeken's compensation for that year is 173 or is 73 or whatever. In the context of what this case is, and what Mr. Boeken's damages is and what I am about to talk about, it's not a huge issue.

But I have taken this time to explain the flow of the income through the witnesses and how it worked.

He was a successful business man.

And you know, we followed, through his testimony, through his wife's testimony and some testimony, that living in an apartment in Santa Monica, and going from there to Pacific Palisades and going from there to Topanga and she said his love was business.

That's one of the things that attracted her to him. I guess not surprising. Her dad was a business man. And that's where she — she grew up in that kind of environment.

She loved hearing powerful Richard do business on the phone.

Anyway, the guy was not born with a silver spoon in his mouth. He worked hard, and he was successful. And he was making darn good money.

Like he will never make any more. [6011]

And the loss of earnings past, and earning capacity that Dr. Formuzis told you about is someplace in the vicinity of 2.1 million dollars.

Past is like \$450,000 in round numbers. And the future, it's something like 1.7 million dollars.

This assumes he would have stopped working when he was, I think, 66 and a half years old. So you want to put 66, 67.

But he didn't want to quit totally, but that's where we stopped.

And that's where the number comes from.

So to compensate Mr. Boeken, medical expenses, loss of earnings, loss of earning capacity in the future.

It was brought out here that the oil and gas business is a risky business, okay.

And it was also brought out here, and I don't want to make anyone unhappy with Richard Boeken or Elvis Mendez, but the energy business is not a very bad business to be in nowadays, unfortunately for us consumers.

But there is a line of earnings from when he started out and his income starts at around \$75,000, and it just goes straight up. Except for those two little problems that I just

[6012] mentioned.

So he should be compensated for his loss of earnings.

And then there's something called general damages.

There is a jury instruction on that, pain, suffering, fear, anxiety, all these words, and I am not going to go through them.

His demeanor and his facial expressions and his size, and recounting what happened through his diagnosis, and waiting for the results of the pathology test, and what happened to him along the line, I know you heard that a month ago, it's there if you want to hear it again. But it speaks more eloquently and more genuinely than I ever could. And I have been doing this a long time, way better.

He takes his son to the doctor. While he is there, he has bronchitis. This is not his doctor. He says, hey, what about this cough?

The doctor says, as long as you are here, let's take an X-ray, uh-oo, something I don't like. Let's go get an M.R.I., uh-oo, something I really don't like. I want you to go see a specialist.

And so he has a biopsy and he is lying there on this table, he is having a biopsy, and there's this frozen section, and it's positive, [6013] and there goes part of his lung.

And he is told, you know what, your odds are "X," and I forgot what he said, it was something like 70 percent, something like that, no return, if it hasn't spread to your lymph nodes.

So let's wait.

So, you know, it's the worst thing. It's, I guess, the thing that is terrible.

Some of us have thought about it. Some of us have had to think about it. Some of us have never thought about it. But he has to now wait to hear what some doctor finds on a slide, under a microscope, in some windowless room across town that's going to decide his fate.

And who knows what kind of emotional and mental defenses are put on during that time. But the coin was flipped and it came down the wrong way.

And we know from the testimony in this case, that coin almost always comes down the wrong way. It is a fatal disease.

But he didn't know. So he hoped and he hoped and he hoped. And he was given the news that his lymph nodes were involved. And now his odds were down to, again, I can't quote exactly, but I think it's like 20 to 30 percent is what he said.

Chemotherapy had to be cut short. [6014]

The last dose he couldn't take.

He had all these unbelievable side effects.

Dr. Sarna came in here and said, yeah, that's what chemotherapy is all about. You sit someone down and hook them up to a bottle and stick it in your arm and we feed them poison for six hours. And that poison kills his cancer cells, hopefully. But it doesn't help the rest of you all that much, either.

So he had five of those. And he had some radiation therapy.

And we heard from him, we heard from his wife. We heard a little bit from the stepson.

We heard from Dr. Sarna about some of those side effects.

And he stopped smoking. He stopped smoking (indicating).

And then in August of 2000, he found out that he had a metastasis to his low back.

And more treatment, debilitating treatment.

He is trying to keep his business together. He is trying to keep his life together. He is trying to put on a brave front for his kid. He was never bedridden, even though they took out part of his lung, he was never bedridden. He was [6015] in a chair, because he wanted to be tough for his kid.

He started sneaking cigarettes from his wife. It has metastasized to his low back.

Who knows what kind of stories people tell themselves about their lives. But when he reported to the doctor, I have these side effects, and this is around Christmastime of 2000, this is just before those depositions were taken, doctor, I am

having side effects from this treatment, vision problems, balance problems, bumping into stuff, the doctor thought, that's what you think, problems from the treatment, and ordered an M.R.I. Which you have seen here.

And all those problems were caused by brain cancer.

And when Mr. Boeken heard that, of course, he was crushed.

And if there was ever any doubt about who was addicted to what, he walked out of that place and went bananas because it doesn't matter any more.

Anyway, for what he has been through since October of 1999, and for what he is going through now, he can't even attend his own trial. And for what he is going to go through for however long he is, before the fatal disease slays him, and for the last of 20 years 21.4 years in the [6016] future, 21.4 years from now, 2001, 2022, it's like around 2022, '23, that's a long, long, long time that he is not going to have, with his wife, with his kid. Things change so fast it is almost impossible for me to tell you how long that is.

But I have a better shot at it by flipping it to show you how long 22 years is.

He was diagnosed at the end of 1999, let's go back to the 1980's, 1977 and a half. No one had any cell phones. No one had any computer. No one had a fax. These things didn't exist.

Jimmy Carter was the President of the United States. Vietnam war had ended for two years.

Dr. Farone was in his first year of Philip Morris.

That's a long time, long, long, long time.

Anyway, your compensation for general damages has to cover since October of 1999 and for his loss of all of the future time and his life expectancy.

Remember that, because, there's a lot of human life that's been discussed in this case. That's around ten million dollars, around ten million. I sat down, and I am pretty good at math, and I sat down and tried to figure it out, [6017] how much here, what there, what there, and I threw in the towel, that's my suggestion.

And I thought about suggesting a higher number. I said, well, I don't want them to think I am greedy. I thought about suggesting a lower number. I don't want to stiff my client.

There's nothing magic about that. But that's the number.

So that's compensatory damages.

Now, here's a switch, and I want to talk about what's called punitive or exemplary damages.

This is not to compensate Mr. Boeken. I am not talking about Mr. Boeken any more.

I am talking about Philip Morris.

But I'd like to, I said this in my opening statement so I would just like to repeat it.

Philip Morris on trial, Richard Boeken's on trial?

I put Philip Morris on trial. Philip Morris puts Richard Boeken on trial.

Richard Boeken's sin was that he believed Philip Morris. That is his sin. He believed them.

And I am going to talk about that.

In fact, I am going to let someone [6018] else talk about them, the people that wrote these jury instructions say.

"If you find that the plaintiff suffered actual injury, or harm or damage caused by defendant, you may then consider whether you should award punitive damages against defendant for the sake of example or by way of punishment."

Let me stop there for a second. I call these punitive and exemplary, this says example and punishment.

But you get the drift. It's to punish, but it's also making an example of. So people coming down the line, later on, if they are inclined to take the same course, to have a little guideline to what awaits them, whoever decides to pull this kind of stunt a again, they will know what awaits them.

"You may, in your discretion --"

And I want to stop again, "discretion" means that. You may find, you may find Philip Morris is the most despicable organization on the face of the earth but you may decide, in your discretion, to do nothing about it. That is your choice. That's your choice.

"You may, in your [6019] discretion, award such damages if, but only if, you find by clear and convincing evidence that defendant was guilty of oppression, fraud or malice in the conduct on which you base your finding of liability."

So before I talked about burden of proof in this case, right here, punitive damages, Richard Boeken, through me, has a different burden of proof.

For compensation, for everything we have talked about so far, preponderance of the evidence. 51, 49.

No one's life is being taken. No one's liberty is being taken.

Punitive damages are someplace this side of beyond a reasonable doubt.

Now we are not compensating, this is punishment.

And it's fair. It's fair that the burden of proof be stronger.

Because now it's not just compensation, it's punishment. So it's fair that Richard Boeken, threw me, has to prove stronger that they deserve to be punished.

And the way I visualize it is like this, and this is just me, if this is where we start, even, dead even, 50-50, and we got to go to [6020] this to take someone's life and liberty, 99 to 1, my shorthand, and we got to go this (indicating) for compensation 51, 49, someplace in the middle there is clear and convincing evidence.

And I don't know if there's a number for it.

I know there's a 51, 49. But after that, I don't know.

But clear and convincing evidence is between these two extremes.

So the burden here is by clear and convincing evidence.

The people who write these laws to be written, to be given to the jury, here's what they say.

"Clear and convincing evidence means evidence of such convincing force that it demonstrates, in contrast to opposing evidence, a high probability of truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by preponderance of the evidence. You should consider all of the evidence bearing upon every issue regardless of who produced it."

So this requires more proof than [6021] 51/49. It doesn't define it further. But it's got to be a high front, not like putting someone in prison, not beyond a reasonable doubt, but a high probability.

And I accept that burden, eagerly.

So for a high probability of truth, here's what has to be seen, shown. That Philip Morris was guilty of oppression, fraud or malice.

"Malice means conduct which is intended by the defendant to cause injury to plaintiff, which we don't claim, or, this, we do claim, despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights and safety of others."

So the words there are willful and conscious disregard for the rights and safety of others.

Read the documents.

"A person acts with conscious disregard of the rights or safety of others when he or she is aware of the probable dangerous consequences of his or her conduct and willfully and deliberately fails to avoid

those consequences."

Read the documents, please. [6022]

Aware, aware, aware. Do nothing, do nothing, do nothing. Cover up, cover up, cover up. Misinformation, disinformation, counter-information.

Let the lawyers run the show. Select our programs for litigation purposes. Select our programs for public relations purposes. Select our programs for any purposes other than safety and science. Scientific research abdicated to the lawyers. No involvement on the part of science or business. Lorillard's management is opposed to total management being in the hands of committee lawyers. It's reminiscent of the late '60's.

We are digging our own grave if we do scientific research.

And you know what, there's a bunch of small one's. You have heard it enough, seen it enough. You are going to have it enough.

Philip Morris did not like biomedical research.

Philip Morris didn't do biomedical research.

Philip Morris never tested its Marlboro cigarette until the year late 2000.

Philip Morris repeatedly lied to its customers, population, the Congress, Philip Morris disrespected everything there was except for [6023] one thing, which is the bottom line.

And when the choice came between money and health, it was money. And when the choice came between money and death, it was money.

And when the choice came between money and safety, it was money. And when the choice came between money and the rights of others, it was money.

And when the choice came between anything in the world and money, it was money.

And if you don't think I am right, I am going to quote Mr. Bible in just a bit.

That's oppression, that's malice.

So we have to show either malice or oppression.

Oppression is despicable conduct that subjects a person to cruel and unusual — unjust hardship in conscious disregard of that person's rights.

"Despicable conduct is conduct which is so — pick one, any one gets you where we are going. But in this particular case. They all fit, "vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary, decent people."

One of the remarkable things that [6024] we have heard here from Ms. Merlo, one of the nine senior management team people at Philip Morris U.S.A. Tobacco, is that when they do all of their focusing and polling and researching and test marketing, the people come back and say, we think your company, do you want to hear about looked down upon and despised? We think your company is the devil live on earth. Or, punitive damage if malice is shown or oppression is shown or fraud.

"Fraud means an intentional misrepresentation, deceit or concealment of a material," material meaning for "fact known to Philip Morris with the intention on the part of Philip Morris of thereby causing injury. The law provides no fixed had standards — " injury meaning damage. "The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice."

Yesterday I flashed about five or six of these fraud jury instructions up on the elmo. I did it quickly. Please take a look at them. It's common sense. Where fraud, different kinds of fraud, basically is saying one thing and you know it's not true, you are saying one thing [6025] when you got no reason to say it, because you suspect it's not true, or saying something to lure someone in. The fraud is basically

creating doubt about the health charge without actually denying it.

That's all of these kinds of fraud in a nutshell.

In arriving at any award for punitive damages, you are to consider the following three things: "one, the reprehensibility of the conduct."

In other words, are we dealing here with purse snatchers or are we dealing here with robbers, or are we dealing here with burglarrers, or are we dealing here with what?

And so I am saying to the jury that 600,000 people in the last hundred years have died in American wars, 600,000 Americans, and I am saying to the jury that since 1965, or in round numbers, 17 million people have died prematurely from tobacco in this country.

And I am saying to this jury that I can't even begin, this is so far off of the scale, that I can't really trust this. I can't begin to describe it.

This was all done for money.

This is the 1994 dear shareholder letter from Mr. Bible.
[6026]

Second thing you have got to consider, the amount of punitive damages which will have a deterrent effect on the defendant in light of its financial condition.

And this is why, in this particular case, I cautioned you earlier, Philip Morris's wealth is really not to be considered when you think about compensating Mr. Boeken.

But in this case, that is put before the jury, because it's something that must be considered here. How much punishment will it take to have a deterrent effect in light of the defendant's financial condition?

If I was going to punish or make an example of one of my kids, who makes a heck of a lot less money than I do, then the fine that would be imposed on one of my kids would be a heck of a lot less than if I imposed on me to prevent, to deter future conduct.

This is what Mr. Johnson told us.

This is revenues.

This goes from '98 to 2000.

And while I — just so I don't forget it, he was asked by Mr. Carlton, well, when you are telling the jury about these numbers and Philip Morris's financial condition, Philip Morris U.S.A.'s, financial condition, meaning you are taking into account litigation and settlements, Mr. [6027] Johnson told you, totally uncontradicted, that Philip Morris has stated in its later shareholder letters and its later financial stuff, we have, our profits have been way up since those settlements.

Remember that. Settlements, profits went up.

Anyway, here's what's happened from 1998 to 2000, this is domestic tobacco alone. Their operating revenues have skyrocketed.

This is profits. Same period of time. Philip Morris, U.S.A., from 1998, I guess that's the proof of the pudding there, profits have gone through the roof.

I already said that but this is not going to be in the jury room. So I simply got that from multiplying 400,000 by the number of years.

The financial condition of the company that you must have in mind is not the big Philip Morris parent company, not. It is Philip Morris U.S.A., which is the domestic tobacco company.

Because the domestic tobacco company is not traded on the new york stock exchange separately. Mr. Johnson figured out several different ways of figuring its financial condition.

And here's how he went about doing that. [6028]

First, he talked about the domestic tobacco company, that's the defendant, that's who we are suing here.

First he talked about their version of the big company's overall revenues. And he showed us that tobacco U.S.A. Accounts for roughly 28 percent of the big companies' revenues.

And you can see international tobacco and international food and U.S.A. Or North American food, it's all there. But what he did is he took the proportion of revenues, and revenues were 80 billion dollars, in round numbers, and on profits he did the same thing. And there's the overall profits,

tobacco U.S.A., is a third, the overall deal, something like 16 billion dollars, and the reason he did these two things, we have a third on one, 28 percent on the other.

He figured the market capitalization of the company that's traded on the stock exchange and the market capitalization is simply taking the stock price out there today and multiplying it by how many stocks are out there. And you get, on the daily here, 105 million — 105 billion dollars.

So doing these two things here, he said, hey, 28 percent, 33 percent, and he told you that he figured that the financial condition of Philip Morris domestic tobacco, figuring it that [6029] way, was someplace between 30 on the one hand and 35 billion dollars. And he didn't have a favorite.

But he did have a favorite in another way. And the other way was to tell you that Philip Morris had just bought out the name rights of three tobacco companies, three tobacco brands, chesterfield, l&m, and the third one I forget, 300 million bucks. And these three brand names accounted for something like two-tenths, I may be off by a couple tenths, but a couple tenths of one percent of the market.

And he said if Philip Morris pays this much for a couple of tenths of one percent of the market, here's what the market is worth.

Philip Morris's share, U.S.A., 75 billion dollars.

And he said, in his view, that was the financial condition, that was the proper financial condition to take that into account for what I am going to ask you to punish and deter, 75 billion dollars.

Anyway, he's number 3. Let me say something else first.

Just to put this in some kind of terms that we can understand, what I am about to say, let's say the average person, just to make an average person, just for the heck of it, makes \$50,000 a year, which the average person does not, [6030] and let's compare it to five billion dollars a year, and the multiplication factor as hundred thousand, so if the average person goes downstairs in the cafeteria here and buys this cup of coffee for a buck, Philip Morris' equivalent to this cup of coffee, is \$100,000.

Or if the average person goes down to the parking garage and pays ten bucks to park, I know you jurors don't have to do it, but 10 bucks, the same thing for Philip Morris to park is a million dollars.

If the average person makes \$25,000 a year, double them up. \$200,000 for a cup of coffee, same thing. Two million bucks to park.

That's what we are dealing with here, average person to Philip Morris.

That's how many years' earnings?

Third, the punitive damages must bear a reasonable relation to an injury, harm or damage suffered by the plaintiff.

And there is no definition, that's for you to decide.

So I have got 10 minutes. And I am not going to quite take the ten minutes. But follow this along, if you will.

Let's just say that I know none of us would do it, but let's just say that someone was in the diamond lane with one person in the car [6031] and you got caught. A minimum fine for being in the Diamond Lane with one person in the car is 271 bucks.

Now being in the diamond lane with one person in the car is not exactly wife beating. It's not even purse snatching. That's not even taking a candy bar without paying for it.

But being in the Diamond Lane with one person in the car is 271 bucks. And just to bring this all down to where we can understand it here, the \$271 fine, if the average person is making 50,000 bucks a year, that's a 27 million dollar fine for Philip Morris.

In other words, to make the same impact on Philip Morris as it does on the average Joe driving down the diamond lane, if average Joe or Josephine makes 50 grand, is 27 million, \$100,000.

And if the average Joe or Josephine is making 25,000 bucks a year, that same Diamond Lane violation fine is \$54,200,000.

And I think the average person probably makes someplace between those two numbers, somewhere.

So I just want to say, punitive or exemplary damages here of 27 million dollars to 54 million dollars is a diamond lane violation.

Philip Morris had five billion [6032] dollars a year, makes 100 million dollars a week, 100 million times 50 gets you five billion.

\$100,000 a week divided by seven days is 14 million dollars a day.

Divided by 24 hours, 600,000 bucks in an hour.

I have been arguing since 11:00 now, after the break, approximately, while I have been arguing since 11 o'clock, Philip Morris tobacco, U.S.A., has just made another \$600,000.

My argument has gone on for a day and a half. Philip Morris has made 21 million dollars.

This trial has lasted since March 19, Philip Morris has made just shy of a billion dollars.

This is the small company, not the big company.

1994:

"The legal arena we're committing all the resources necessary to defend the company from new forms of litigation, making sure we have the better fire power than our foes, no matter how formidable. In the new class action suits and state medicaid cases, we believe the law continues to be on our side. All those new cases [6033] pose difficult challenges. We should ultimately prevail on them just as we have been successful in other types of cases over the last 40 years. It is important to note here that the tobacco industry has never lost or paid to settle a case. Beyond defending ourselves, we are turning the legal tables on some of those who attack us. We are going on the offensive to vindicate our rights and to make it clear that current notions of political correctness cannot be used to justify unlawful conduct that abridges those rights. We're suing the E.P.A., suing state and local governments, suing ABC," hey, they

are really tough.

They got a right to think they are tough, because they had an unrestricted right, in which their company has gone from being what Ellen Merlo called some small tobacco company to having the franchise, the largest consumer product organization in the world based on that.

You want to de[t]er future conduct?

October 13, 1999, this is right around when Mr. Boeken was being diagnosed with lung cancer, also being launched is a hundred [6034] million a year T.V. Advertising blitz, advertised —

MR. LEITER: Objection, hearsay.

THE COURT: Sustained.

MR. PIUZE: Okay. Ms. Merlo admitted after I leaned on her pretty hard, that Philip Morris spent 100 million dollars to advertise the fact that it gave 75 million dollars to charity.

Shame on them.

Now those, this is Professor Cobbs Hoffman. Those who do not pay attention to the past are doomed to repeat it.

Those who do not pay attention to the past are doomed to repeat it. This is the time, this is the place, you are the people, now.

You want to really punish Philip Morris, you want to really punish Philip Morris, watch.

That's about a three diamond lane violation, three diamond lane violations. That's me taking away my kid's allowance for a week, which is a nice round number. I have no pride of authorship.

If ever anyone deserved it, this is the time, this is the place, you are the people. Don't let them escape.

After 1978, as Mr. Carlton brought [6035] out, and after the settlements, their profits went up three times. Stop it.

Thank you.

THE COURT: Thank you, counsel.

All right, ladies and gentlemen, we will take our afternoon break. We will see you at 1:30 this afternoon. Don't discuss the case with anyone.

(AT 12 NOON, THE LUNCH RECESS WAS
TAKEN TO 1:30 P.M. OF THE SAME DAY.)

* * *

[6193]

* * *

[REBUTTAL ARGUMENT]

(THE FOLLOWING PROCEEDINGS
WERE HELD IN OPEN COURT IN
THE PRESENCE OF THE JURY.)

THE COURT: Our jury panel is back with us. Counsel
are present as well.

Mr. Piuze, proceed.

CLOSING ARGUMENT

BY MR. PIUZE:

I am still sorry I made you sick.

I am still waiting to hear an apology.

Wait until hell freezes over. Wait to hear an apology not
just for Mr. Boeken but for lots and lots and lots of other
people. I am waiting to hear an apology. I will wait until hell
freezes over on that one too.

So here's what I would like to do to start. And I am
going to go as fast as I can. [6194] We have been here a long
time.

Thank you for listening so hard.

This stuff speaks for itself.

But there was a question, this is my favorite document.
This is my favorite document.

And there was a question posed by Philip Morris in
closing, old Freddy Panser in 1972. Well, Freddy talked the
talk, but did the tobacco industry walk the walk?

And so the question was whatever became of this, gee, whatever became of this?

The last word spoken here, and I wrote them down so I would be sure to get them, were, "free choice and responsibility."

And the free choice is based upon information. You want to intelligently choose something, all we needed information.

And that isn't too brilliant.

They figured that out a long time ago.

So people out there are going to choose to keep their industry filthy rich or the people are going to choose that they are too scared to use a product, which, by the way, ain't water, ain't food, wasn't around before around 1920 in this country.

And in order to keep this going, [6195] the information system had to, in their view, get jammed up.

And so old Freddy Panzer in 1972 said, for 20 years, so that means since '52, but for 20 years we have been doing dah, dah, dah, dah. And its been a holding strategy.

And our holding strategy consists of creating doubt about the health charge without actually deny it.

And so if we were asked here, gee, whatever became of that, just one more of those little old documents that nothing happened on that little old document.

Well, here is another little old document. And this is 1984. This is 20 — I am sorry — 12 years later.

Let's see what became of what Freddie Panzer had to say to Horace Kornegay in 1972.

Because Horace showed up in Congress, this document for '56, in 1984.

And Horace, who Mr. Panzer had written that memo to, said the following to Congress, 14 years later.

I should have used more scotch tape on this. There's a war against us. 39 scientists came here to Congress to present [6196] testimony against the anti-smoking bills.

39 scientists. The evidence is based upon their own published research for their review of scientific literature. Each of them has reached an area of eminence.

The evidence presented by these men and women, as summarized, the scientists are listed and the professional affiliations are listed, we are giving you this, United States Congress, in the belief that the controversy must be resolved by scientific research and the belief that an informed discussion of the controversy is in the public interest.

And I will go with that. Informed discussion is in the public interest and informed discussion was in Mr. Boeken's interest and informed discussion is in every one's interest. Although you won't have the blow-ups, you will have this document, the highlighting has been taken here, from the document we have got to make a couple points.

Philip Morris was right about one thing, I listen, I learn. There's always room to learn.

THE COURT: I don't think you need to give them to counsel.

MR. PIUZE: Okay.

THE COURT: Thank you. [6197]

MR. PIUZE: Here it is. "Creating doubt about the health charge without actually denying it."

Because, remember, for Richard Boeken, and for tens and tens of millions of other people, who were fed information and misinformation, they relied on the information that was out there on deciding what to do, whether there was a controversy, whether, honest to god it's completely dangerous or whether there's a controversy and there's something out there.

Anyway, here's the plan in 1972, let's watch and see if anything became of it. First, let's get to the "without actually denying it" part because this is what goes to Congress in '84.

It is important to note that neither the scientists nor the tobacco industry made or make any claims other than it is not known whether smoking has a role in the development of various diseases and a great deal more research is needed.

So as far as without actually deny it, there's one part of it. Because he was careful to say, we ain't really saying, and your scientists ain't really saying, it's just that we don't

know anything.

Now, let's take a look at the other [6198] part, creating doubt about the health charge.

Whatever became of Freddy Panzer's memo? There were basic flaws in the methods used in the epidemiology studies that cast doubts on the accuracy of the claimed correlations.

So there they want to create doubt, and here they are telling us that they tested doubt.

Talking about the epidemiology surveys, both these and other factors can bias an epidemiology survey and can cast doubt upon its conclusions.

Don't forget, a guy who is turning in this report is the guy who got the memo from Mr. Panzer, 12 years before that says, what we are going to do is cast doubt and create doubt.

To the Congress, persistent errors in diagnosis of lung cancer has reported on death certificates continued to cast doubt on the validity of those studies.

Here's 1972 — Excuse me, let me just jump back just a touch, back in 1972. Here are the two things we are going to try to sell, sell constitutional hypothesis and the so-called multi-factorial. It's the air, it's the virus, it is the genetics, it's the stress.

And by the way, we can sell this to 52 percent of the people out there, maybe heavy [6199] smokers and tobacco state congressmen.

So here's how this ends, 12 years later.

The experts took the position, it's not possible, scientifically, to state that cigarette smoking causes lung cancer.

Because of flaws in epidemiologic studies, failure of animal studies, recent work reported or factors involved in the disease.

Far more research is needed to find the cause or causes of disease.

Okay. Well, that's what became of the Freddy Panzer memo. It found its way to the United States Congress 12 years later.

And it came back again eight years later when that smoking camel got up there and said we don't know the

cause of lung cancer.

That's what happened to Freddy Panser.

And in 1984 when Mr. Kornegay, on behalf of the tobacco institute, says here, we need a lot more research to figure out what we can do.

Let's just think about Dr. Carchman coming in here and saying something that I think is almost unimaginable in a consumer-oriented society that we live in, we, with unlimited researches, unlimited budgets, unlimited equipment, unlimited facilities, unlimited scientists, have never, ever, [6200] ever, tested a Marlboro cigarette for biohazards until this past year.

And you think that's a red herring?

Well, check this out. What if Marlboro came up with more biohazards than winston?

Which brand takes a beating at the store?

What if Marlboro came up with more biohazards than Camel filter, which takes a beating at the store?

And I am not just pointing to Philip Morris now, they all do.

But Philip Morris, think about it, in our consumer society, the finished product that goes into people's bodies, has never been tested, this gigantic empire was created, they purposely never tested it until sometime in the last year.

And now after having 60 percent of the American male population smoking cigarettes at one time. Over 50 million people smoking cigarettes in this country, right now, probably over 50 million people smoking cigarettes in this country, now when they do a test on the cigarettes, they got to get someone's signature to say, I understand that this stuff can really honest to god kill me. No B. S.

And so for my last, I am not going to take a long time this afternoon, but for my last [6201] six seconds now, I will say again, the largest animal experimentation ever done in history with a consumer product, the animal that was chosen for the experiment was us.

And that's disgusting.

THE COURT: All right, very well.

It's now noon. Ladies and gentlemen, we will see you all at 1:30. Don't discuss the case with anyone.

(AT 12 NOON, THE LUNCH RECESS WAS
TAKEN TO 1:30 P.M. OF THE SAME DAY.)

[6202]

(THE FOLLOWING PROCEEDINGS WERE HELD
IN OPEN COURT IN THE PRESENCE OF THE JURY.)

CLOSING ARGUMENT (CONTINUED)

BY MR. PIUZE:

The last thing that Philip Morris told you all was that this case was about free choice and responsibility.

In his words, their words, its words, free choice and responsibility. So that's — 2001, free choice and responsibility.

And here's 21 years ago. This is Exhibit 388, and didn't they pivot right on the head?

The entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer cigarette case. We cannot defend continued smoking as free choice if a person is addicted.

21 years ago, 21 years later, we defend cigarette smoking as free choice even though [6203] a person is addicted.

Now, they hid the addiction thing. They hid the addiction thing as long as they could possibly hide it.

And it was only this year in the year 2001 that they finally fessed up to it.

But think about it, how can we defend continued smoking as free choice, if a person is addicted and if we give them half truths, semi-truths and half lies to keep them hooked and reassure them it ain't as bad as everyone says.

Now, I have thanked the court, the staff, I have thanked you several times.

And I'd like to take a second and I'd like to thank Mr. Goldstein and Ms. Lawlor who have been helping me put this case on. And one of them, who is going to remain confidential here, slipped me the following pearls of wisdom.

"People have to know the truth. People have to know the truth in order to make a free choice. If you don't have the truth, you can't have the free choice. Without the truth, you are not in a position to make a free choice."

Now, what this is all about from 1972, and please remember, they are bragging, they have already been doing it for 20 years when that [6204] memo was written in 1972.

What they are doing in 1972, in 1952 and 1982 and 1962 and 1992, but now they have stopped, what they were doing was putting out something that, in government, is called sometimes plausible deniability, a story, something to latch onto, something, anything.

And what they did was they spent money to put out a story that they knew was B.S.

And they had the gall to come in here and say, Richard Boeken and 50 million Americans or 60 million Americans or 70 million Americans, or however many more there were, should have known darn well, when all of our Ph.D.'s and M.D.'s and geniuses are scratching their heads, saying we don't know what caused, we don't know what caused, it could be so many other things, don't you worry about it.

That's hypocritical to the max.

So this is exhibit number 388. And for any of you who wrote down the last words in this case from Philip Morris, "free choice and responsibility," remember, 21 years ago, we can't defend smoking as free choice if a person is addicted.

And there's no dispute in this case that Richard Boeken was addicted, big time. And even Dr. Beckson, who was going to come in here as [6205] he did up in San Francisco a couple years and say no, no, that person ain't addicted, changed his mind.

Now, on the issue of creating doubt about the health charge without actually denying it, we showed you what went to Congress 12 years later. Here's what Dr. Farone had to say.

And I am reading from this transcript, this trial, page 1549. Don't forget, he started at Philip Morris in 1976.

"About a year and a half after I had been there, and I had been told by Dr. Osdene on several occasions that one of his main missions, as he put it, was to maintain controversy, meaning, keep shedding doubt on whether or not nicotine was addictive and whether or not smoking caused disease."

"It was his job to maintain controversy on addiction, even though you knew that tobacco was addictive.

"And it was his job to create controversy about whether or not tobacco caused disease, even though you knew it caused disease."

Now, that's not the T.I.R.C. Or the T.I.A. Or the C.T.R. Or the anybody, that's [6206] Dr. Osdene.

A comment was made last Friday about, gee, why didn't the plaintiff bring in our former employee, Mele, why didn't the plaintiff bring in our former employee, uydess, both of them testified in a major trial in Florida, where the state of Florida was the plaintiff.

I figure the transcript was clear enough.

But, it raises a question. Why didn't they bring in osdene?

He's around.

MR. LEITER: Objection, your Honor.

THE COURT: Sustained, no evidence.

MR. PIUZE: Why didn't they —

THE COURT: No evidence about where Osdene is.

MR. PIUZE: Oh, yes, absolutely.

THE COURT: All right, if you can point it out to me then, I don't have a perfect memory. I don't know where

Osdene is.

MR. PIUZE: Brazil.

MR. LEITER: Objection, your Honor.

MR. PIUZE: I will move on. I will withdraw that. I think I am right but I will withdraw it.

THE COURT: All right.

MR. PIUZE: Why didn't they bring in [6207] Campbell? Because we know Ellen Merlo sees him at lunch every once in awhile in New York City.

Where are all these dudes, where are they?

So, yeah, I relied on testimony taken down from the state of Florida to put these two witnesses on.

But if someone is going to ask the question, I will ask the question.

Where were these guys?

And I am going to put Dr. Farone's deposition away here — not deposition, his trial testimony away here. But before I do, I'd like to say a couple things about it. You people out of the community can tell someone who's B.S.'ing from someone who is truthful.

That's what we learn to do from the time we are little kids and we grow up.

I will sink and swim with Dr. Farone. I will go out in his boat with him any day.

He goes around and testifies for free, until this year, because he's ashamed.

He feels partially responsible. He didn't go find the F.B.I., he didn't go find "60 minutes," and he didn't go find these government agencies. They came and found him. [6208]

And they came and found him someplace in the vicinity of about five and six years ago when the stuff really started to hit the fan. They came in for him. He didn't go to them.

In other words, disgruntled employee going out and ratting?

No. As a matter of fact, he kept his mouth shut. He kept his mouth shut for approximately 10, 12 years until the government and the media came and found him.

And what was he doing during those 10 to 12 years?

He is the president of a company that does biology for environmentally friendly work. That's what he does.

All their stuff is biology that won't harm the environment.

Now, I am ready to stand by this guy.

And when he tells you that Dr. Osdene showed him a document, 25 years, 23 years ago, whatever it was, and said, we tested Marlboros for biologic activity overseas and here are the results, you are not supposed to see it, shouldn't be showing it to you, I am going to dump it when I go home. I believe that that happened.

And do I know if Osdene was making up a story to him or not? [6209]

No.

But I know a high-ranking official — don't forget where these guys were on the hierarchy here. This was next to the top. One of these people at one of these directorates told another, we view some of this denitrification product as we have tested it and you are up against a real honest Marlboro, for biologic activities and here are the rules, I am destroying them, I shouldn't even be showing you.

Can you imagine — now, recent controversy that I mentioned here, can you imagine with 150 people killed as a result of Firestone tire blowout, can you imagine if documents like that were uncovered? Unbelievable.

How can a product be put on the market without testing it?

These documents tell a story. Stay away from testing for cancer.

They didn't want to know.

Now, I heard also last Friday that this case was about money. Well, I guess it is about money.

This case is about choice, yes, this case is about choice.

This case is about Philip Morris's choice.

This case is about the tobacco [6210] industry's choice, and 1954, to do the right thing, and cost themselves a ton of money, or make a ton of money at the total disrespect of human life, their consumers, the government and our society.

So we have been in here long enough that we hear this called an epidemic. And you know what, it is. It's a terrible, terrible, terrible epidemic.

And it's an epidemic that's been going on for money.

We hear this morning, well, gee whiz, Philip Morris settled its suit with the Attorneys General, States Attorney General. It did.

And their profits went way up. And Bible bragged about it, and Mr. Johnson told you that.

These are survivors. Those are survivors, survivors, survivors. These are survivors.

You better believe this case is about money. And you better believe that a body count out there is about money too. That's all that it is about.

They had a choice, and they chose money. And I heard last Monday, excuse me — Friday, that maybe there was a thought that Philip Morris was easy picken's, so that's why we are [6211] here, because they are easy picken's.

Give me a break.

I am a relatively brave guy. At least I consider myself to be.

But they ain't easy picken's.

As a matter of fact, their Chairman, Mr. Bible, said in 1994, here's the kind of picken's they are.

"We are committing all of the resources necessary to defend the company from new forms of litigation making sure we have better fire power than our foes, no matter how formidable."

He wasn't talking about me. He was talking about 46 states attorney general coming after him.

He was going to have better fire power than all of them.

So, I guess, it looks like they have better fire power than Mr. Boeken does.

Except Mr. Boeken, honest to God, has the truth on his side.

And they don't.

So our society, this is another one of the last things that was said, our society and Mr. Boeken made choices based upon fraudulent conduct — excuse me, our society and Mr. Boeken made choices. Yes, based upon fraud, based upon [6212] misdirection, based upon hidden evidence, based upon creating doubt, based upon sucking people in.

Late in the closing argument, it was stated by the defense, a representation must have been made to fool people before you can find us liable.

I am a believer. A representation must have been made to fool people before they get what they deserve.

Well, what were they out there doing all of these years but fooling people or trying?

And the incredible ultimate irony is, the ones that they succeeded in fooling, become mentally deficient, undeserving, liars, idiots.

Isn't that cute.

Their best customers, the ones who believed them, the ones who forged over the money.

Aren't just disrespected, they are insulted.

There's Mr. Boeken's deposition right there.

Do you want to listen to that, you can.

Don't have to.

Some of the first words in that deposition were, "Where did you come from this morning?" [6213]

"Radiation therapy for my brain."

I think there are six separate deposition settings there. I know it's 18 hours. I know that some of those sessions were less than two hours because he had to throw in the towel because he couldn't continue.

I know Mr. Boeken clearly said in there at the beginning he was having problems with memory, concentration, fuzziness and focus.

And one of the things he said is I can't focus, not only can't my eyes focus, my brain can't focus.

But just to remind you, at the end of that deposition, four snippets taken out of there, maybe five, and waived around and he was disrespected because of five snippets there out of 18 hours with this guy sick as a dog, but this

stipulation was read at the end, from the court.

"The plaintiff's direct examination occurred on October 18th from 11:48 to 2:58, three hours and ten minutes, continued on December 19th, went from 10:33 to 2:14, three hours and 45 minutes. Those were taken at Mr. Piuze's office.

"The next day at the law office of Arnold and Porter, which is Mr. Leiter and Mr. Carlton, the [6214] deposition was from 10:54 to 12:57, two hours.

"Then another deposition the next day, December 21st, 10:24 to 12:43, same place, office of the defense, 2 hours and 20 minutes.

"December 27th, a deposition was taken at Mr. Boeken's home, 9:50 to 1:12, three and a half hours.

"December 28th, Mr. Boeken's home, 8:47 in the morning, until 10:10, one hour and 20 minutes.

"And finally, back at the office of the defense counsel, February 10, this year, 10:11 in the morning til 12:45, two and a half hours."

And then the Court added it up, 6 hours and 45 minutes for the plaintiff, 11 hours and 40 minutes for the defense. That's 18 and a half hours of deposition. There's 18 and a half hours of deposition.

Was this guy sick?

I guess.

And was this guy having all kinds of medication? Yep.

From radiation? Yep.

Steroids? Yep. [6215]

Sleep deprived? Some of his first words in there is that he got about three hours of sleep the night before.

But you know sometimes these words speak better than I can. Because here is this great question, this is on December 27th, from Mr. Carlton, and the issue here is when he believed or didn't believe that they were lying.

So this is Mr. Carlton asking.

"Q At some point along the way you concluded the cigarette companies were not telling the truth about the health effects of smoking?

"A Right.

"Q When?

"A That would be after — that would be in 1996. I believe that's the correct year.

"Q What was it that caused you to change your opinion about the truthfulness of the cigarette companies?

"A My mother passed away of lung cancer."

And Mr. Carlton tells Mr. Boeken, "your mother died in 1994, didn't she?" which she did.

Mr. Boeken didn't even remember [6216] here the year his mother died.

Mr. Carlton knew it because he told him on an earlier occasion, which I may or may not show you here in a minute.

But the point I am trying to make is, Mr. Boeken messed up on two years when his mom died all through these depositions.

So is it surprising to me that there's a few things he can wave around and say, dah, dah, dah, dah, [Boe]ken is a liar — didn't hear that word, but that's what it is meant to imply, we can't believe anything he says.

Bull.

But here, that's one day, here's another day. How many times did we hear, during the course of this defense closing statement, something to the effect, Mr. Boeken didn't ever hear — Mr. Boeken didn't ever hear that smoking cigarettes was bad for you?

No one can believe that. He couldn't have been in a time warp. Look at all of our "Los Angeles Times" and on and on and on and on.

The problem is Mr. Boeken never said that.

See, never never said that.

Here, this is February 10th, this is Mr. Carlton.

[6217]

Mr. Carlton's question.

"Q Mr. Boeken, you heard in the 1960's that the Surgeon General had issued a warning?"

There's a reason Mr. Carlton asked that because Mr. Broken has already testified to that earlier in his deposition.

"A Sure, I heard it. There was an argument, a conflict over it."

So this little thing that I heard again and again and again this morning and Friday, how in the world could broken not have heard that cigarette smoke was bad for you. He heard. He knew about the Surgeon General's warning. He knew it was in the '60's.

But hearing, hearing ain't believing.

Let me tell you. I know that — remember we had Mr. Ferree in here. We had Professor Viscusi from Harvard in here, the economist for the defense. We had Neal Benowitz in here who talked about it to some extent and I am going to read a touch from him.

But one of them along the line, and I am sure it was Mr. Ferree said, hearing isn't necessarily believing.

There was a motorist who got beat [6218] up by the police or so he said.

And everyone in the world heard it. They didn't just have to hear it, we even had it on video.

It is one of those rare instances that's so bad the case went on for trial for —

MR. LEITER: Your Honor, I am going to object to this as outside our record.

THE COURT: It is. It can be argued by analogy but move on.

MR. PIUZE: Let's just say there have been times when police officers could get tried in their backyards for assault and hurting people and walk and there have been times when they could walk even though it was captured on film.

Because hearing ain't necessarily believing. And even seeing sometimes isn't necessarily believing. Just depends. It's in the eye of the beholder.

So, yes, Mr. Boeken had heard that there was a Surgeon General's report, and yes, Mr. Boeken was aware that warnings went on the side of the specific packages, and yes, Mr. Boeken knew that there were claims that cigarettes would be bad, would do bad things to you, but that's not all he knew, that's not all he knew.

This is Mr. Carlton again. Let me make sure, this is Mr. Carlton. This is from [6219] December 27th, to Mr. Boeken.

"Q You testified when being questioned by your own attorney that you believed the Surgeon General's warnings were politically motivated. Do you recall that testimony?

"A Yes, I do.

"Q When was it you first formed that opinion?

"A Somewhere in the late '60's, mid-60's, someplace in that time period.

"Q Mid to late '60's?

"A Yes, I recall a hoopdegaw about a warning.

"Q When you say "hoopdegaw," what do you mean by that?

"A That's all I knew. The Surgeon General was having a warning."

Why is Mr. Boeken bringing this lawsuit? That was an issue that was raised on Friday. Start you off with this reason. He had heard in the late '90's about additives going into the cigarettes. And he was very angry "and expressed to my wife how angry it made me."

And at this point, he got mad about [6220] he information he had heard.

Now, a person's last days on earth, I guess, should be as peaceful as possible. And a person's last days on earth maybe should have as little strife as possible. And maybe a

person should try to enjoy and relax and take it easy in his last days.

But Mr. Boeken gave up some of his precious time in his life, at least 18 hours' worth sitting right there on that table, and has been involved in this litigation for over a year, and Mr. Boeken gave it up for many reasons, one of which is he, to quote Dr. Hoshizaki, is p.o.'d. He's very, very, angry.

Can we expect less of the Marlboro man?

He should be angry.

He should be angry.

Philip Morris says, well, we never talked to him, we never told him anything. Gee, what did we ever say to him?

Well, here's what they said to him. Look at this, kid, look at this, or this.

He held this up in his deposition, it's on the camera in the deposition transcript. Hey, kid, look at this. And look at this. And look at this.

So, yeah, they talked to him all [6221] right. They talked to him with the best advertising effort that money can possibly buy and I am not an advertising expert.

And the advertising part of the case is not exactly the strongest thing that brings out my strongest feelings but I will stay with it for a minute or two.

Dr. Goldberg is the head of marketing at penn state university. And Dr. Goldberg didn't do any studies for this case, he didn't

do any experiments for this case, that's true.

But he has for the government of canada. And he has for the government of the United States.

He's worked on projects for the government of the United States and the Government of Canada having to do with kids smoking.

And he discussed it in tremendous detail while he was here.

And I will just remind you of just one little vignette. He's from Montreal, Quebec, Canada, which happens to be a bilingual place, speaks French, speaks English.

And he talked about the fact that the Government of Quebec had taken off television all kinds of ads that would

appeal to kids, he didn't talk about tobacco, about Matel toys, sugar [6222] puffs, rice, whatever cereal showed on Saturday morning, all that stuff off the tube.

But the English speaking kids, they were getting their television feeds from Maine and Vermont and places like that; whereas, the French-speaking kids, they didn't get any information at all.

And so he went out and did a study, happened right in his back yard, and guess what, the English-speaking kids, their buying habits didn't change a bit.

The French-Canadian kids the sales of all that stuff went right, right down, because there is no more advertising.

Now, this is a big-time guy, he knows his stuff. This is his business and he came in here and said, all of that stuff is designed to attract kids.

And that was his testimony.

And he also said that with no kids, they don't have a business.

Now, I get a laugh out of hearing Ellen Merlo come in here. And I will just tell you, I consider myself relatively street smart. I won't trust her any further than I could throw her. I am with all those people, I am with the American Lung Association.

THE COURT: Counsel, your findings, your [6223] findings about who you believe and who you don't believe are irrelevant.

MR. PIUZE: I apologize.

THE COURT: Thank you, sir.

MR. PIUZE: I will cast my vote with the American Lung Association, with the Committee for Tobacco-Free Kids, with the Attorney General of this state and with the school superintendent of this state. I will cast my votes for them.

She admitted they wouldn't trust her or the company any further than they could throw the company.

And so she came in here with this fancy chart, Philip Morris comes in here with this fancy chart and says, look at this, we have got a new way of doing this now, and we have got a special person over here and the special person's job is

to make sure kids don't smoke.

Oh?

It sort of reminds me of the time they set up a committee for tobacco research back in 1954 to get to the truth of the matter.

You can set up as many committees, as many post, as many people as they want.

It's smoke and mirrors.

But what's happening here nowadays, you have heard here that tobacco advertising has been banned from the tube since 1971. I turned on [6224] the television set and I see Philip Morris's name all the time.

We know that in the state there are textbook covers that have Philip Morris on them.

Ms. Merlo said, truly, you know, nothing happens by accident. It didn't happen by accident that this teeny little country company got into the biggest consumer products company in the world.

And one of the reasons it isn't by accident is because they test — they test market things. They poll things. They focus group things, they try things in advance to see how it is going to work.

This trial is an example.

So she comes in and says, you know, when we have been actually polling people, talking to people, some people actually come back and say they honestly believe we are the devil.

And so I got a series of rhetorical questions here.

If there was a doubt, would the devil create something and give it to people that would make them very, very, very sick, slowly and painfully and kill them?

And if the answer to that question is yes, go to the next question. If there was a devil, would the devil make this product very [6225] attractive to young people by saying, look here, you want to be a super model, look at her, she smokes.

You want to be a famous athlete, look at him, he smokes.

You want to be tough like that cowboy, look at him, he smokes.

You want to be a man's man or a marine or macho, look at him, he smokes.

And if the answer to that question is yes, go to the next question.

If there really was a devil, would the defendant make this stuff addictive so that after you started using it, you either couldn't stop or would have a hard, hard time stopping.

Don't forget, Dr. Benowitz said there are some people that can stop. Rare. But there are.

And if the answer to that is yes, go to question number 4. If there really was a devil, wouldn't the devil take pleasure in insulting people by charging them money for this product?

And if the answer to that one is yes, go to question number 5 and there's only two more, if there really, really was a devil, and someone blew the whistle on you and said that stuff kills, that stuff will make you sick, that stuff [6226] will cause lung cancer, that stuff is addictive, if there really was a devil, would the devil say, oh, no, we got to study it some more, we are not sure about that, our scientists say that maybe it doesn't. We need to study long, long, long-term. And if the answer to that question is yes, if there really was a devil, would he name the President of his company Bible?

So here's Mr. Bible, with this introduction.

It's from Minnesota. This was read during the trial.

"How many would have to die from smoking before you would reassess your duties one? A hundred? 5,000? How many, sir?

"A Well, I don't know that anybody does. So I find that a very hard assumption to make."

Next question: This is Mr. Cerisi.

"I didn't ask you that yet. We will get to that. How many would have to die from your product before you would reassess your duty?"

"A I would have thought, if you are forcing me to say that somebody, I would have to assume [6227] somebody died. If one person died, I would reassess my duties.

"Q So if one person died from smoking then you reassess your duties; is that correct?"

"A Yes, I would reassess my duties. I would look at all of my duties.

"Q Would you shut down your business if one person died?"

"A Well, that question has actually been asked of me publicly, and at the time I said 'Yes.'"

But then he went on to change his story.

"And the reason or one of the reasons is, I subsequently concluded that probably wouldn't be a very effective thing to do because there's quite a large supply of cigarettes in the supply line."

And I want to discuss that.

A chart was shown by Dr. Peto, English, genius, brilliant, one of Dr. Doll's people. Protege of Dr. Doll.

Dr. Feingold drew that same chart on this big piece of brown paper that was here when [6228] I showed you.

And it's not going to be in the jury room.

What the brown chart means and what the graph meant and what was testified to is this: that as a person continues to smoke, the person's risk of getting lung cancer goes up. And when a person stops smoking, it never goes down.

It stays. Obviously, anyone, even if they are 99 years old, should quit.

But whatever the risks are, they never go backwards. If a person quits at 40, the risks don't go down, 45, don't go down, 55, don't go down.

And so what this man said about cigarettes and the pipeline, there's not just product in the pipeline, there's death and disease and destruction in the pipeline too.

And for those former smokers who have quit, any time they start coughing, they got to wonder and look over their shoulder and say what's that?

So what he said about the pipeline isn't just product, it's victims, victims in the pipeline. And that if these things magically disappeared tomorrow, there would still be victims in the pipeline.

And back to this man again. [6229]

We were told on Monday that this case is about money.

Right. This case is about money. Right. Right. Right.

This case has been about money since 1950. This case has been about money since 1954. This case has been about money every day, every hour, every minute, ever since then.

And the longer this ball is kept in the air, it's five billion bucks a year now off of domestic tobacco alone, five billion bucks a year.

So you want to do more studies, Carchman wants to start some new studies overseas. Well, gee, takes 20, 30 years for people to get cancer, well, it may take awhile for those studies.

Yep. Studies were needed in 1972, studies were needed in 1984, studies were needed in 1990.

When Campbell was before Congress, studies were needed. That's right.

And the longer it's put off, study, study, studies, the cash register keeps ringing.

And there's a scale, nothing in life is free, nothing is for nothing.

Cash register rings, something happens on the other end.

Just take a look at this, please. This is the easy picken's and I want to make a [6230] point there and then move on.

This is Mr. Bible. We, in the legal arena, were committed, were committing all of our resources necessary to defend the company from new forms of litigation, making sure we have got better fire power than our foes, no matter

how formidable.

In the new class action suits and state medicaid cases we believe the law continues to be on our side. Although these new cases pose difficult challenges, we should ultimately prevail on them, just as we have been successful in other types of cases over the last 40 years.

It is important to note here that the tobacco industry has never lost or paid to settle a case. Beyond defending ourselves, we are turning the legal tables and some of those who attack us, we are going on the offensive to vindicate our rights to make it clear that the current notions of political correctness cannot be used to justify unlawful conduct that abridges those rights.

We're using — excuse me, we're using the E.P.A. over, suing state and local governments, suing ABC.

So you were told this morning by Philip Morris's attorney, that they paid their way out of the state's attorney general cases. [6231]

Okay.

And you were told by doctor — excuse me — Mr. Johnson, with no contradiction of any kind, that after they bought their way out of the state's attorney general cases, their profits went up, up, up.

To this, that was the profits for the last year. At the end of this case, I am going to be, the end of this case is coming, but remember in my rebuttal I am going to be talking damages and one of the components of the damages is the punitive damages.

And when I put this down, I am not going to pick them up again. But I just want you to know that in assessing punitive or exemplary damages, the wealth of the defendant must be taken into account.

Because obviously, what's proper punishment for my 17-year-old daughter would be the merest slap on the wrist for me and would not even be a gnat landing on Philip Morris's arm.

Taking away a week's allowance from high 17-year-old daughter for a minor transgression, wouldn't really fit what happened here.

When this goes down, I am not picking it up again, but I would like to make a point first. [6232]

The punitive and exemplary damages should be assessed against the domestic tobacco company only.

It is the financial condition of the domestic tobacco company only that we are concerned about.

It is not the financial condition of the — I want to say parent, but "parents" is a bad word because the child in this case, begat the parent.

The umbrella company, let's say, we are not interested in those financial numbers. We are interested in the domestic tobacco company's numbers only.

Which brings me to this.

That's what's happened since the '70's. It's close to triple. Two something. Not quite triple. But that's the deterrent effect. The deterrent, so it won't happen again in the future.

That's the deterrent effect that those settlements had on this company. Nada.

I am not a big note guy, but there are certain things that were said on the defense closing that I feel I have to respond to.

The fact that I only objected twice, that doesn't mean that those are the only two times I disagreed with what was being said, [6233] believe me. There are certain rules of the road here. That's fine. I only spoke up twice.

The fact that I didn't, certainly doesn't mean that I agree with most of the stuff that was said.

So let's start with Dr. Carchman came in and told us cigarettes are dangerous and risky. He did.

This is the new Philip Morris talking.

Dangerous was never, ever used out of Philip Morris's mouth about cigarettes until a year ago. Ever. Ever.

They spent hundreds of millions and billions of dollars putting out advertising images to the exact contrary and the fact that they come in now, chastised after being beat up, slapped around, run to ground, and say, dangerous, that ain't the way it used to be and that isn't what they used to say, never been heard before.

This is a new Philip Morris.

And Dr. Carchman came in here and said, cigarettes were risky. Now, that was something that was invented for the '90's. That was a half step.

That was way too late for Richard Boeken. It was way, way too late for plenty of other people. [6234]

And "risky" is a pretty ambiguous term too.

Now, right off the bat, last Friday, there was an attack on Mr. Boeken, an attack on his character, an attack on what he said, and I just want to — this was the direct examination. This is two days' worth of stuff.

And I asked him questions. And I would just like to share a little bit of this with you.

Before I read that, I am going to share one other part that I haven't — am I talking too long — that I haven't, I am not going to read.

Some of you will know, some of you will remember, some of you won't have any personal knowledge, but this is what it's like to be addicted to cigarettes and this is what he told us in the deposition.

Wake up in the morning, the first thing you do is you reach, and when your hand lands on a cigarette, it is not a mistake, because the last thing you did last night was put them there when you had your last butt.

And after you get out of the shower, and while you are shaving, you have a cigarette.

And when you have that first cup of coffee, you have got to have a cigarette. [6235]

And any time there's food around, you sometimes interrupt your food to have a cigarette.

You can have a cigarette between courses, have a cigarette while you are eating.

Have a cigarette after sex. You have a cigarette with dessert.

Cigarettes must be had.

That's what he says.

What did they say?

They equated in one of these documents you are going to have for evidence, cigarettes are as important as eating

and copulating.

And what did one of their commercials say, their first commercial, the tough guy with the car, the mechanic?

"Sometimes I forget to eat, but I never forget my Marlboros."

You know what, it's true. It's a powerful, powerful, powerful, addictive thing.

Anyway, here's Mr. Boeken, when he was 15 and 16 and he had bronchitis, he was aware that a lot of people claimed that the air in los angeles would cause it.

Smog was really bad and considered really harmful.

People pointed to the smog. And [6236] when he was 15 and 16 and first heard he had bronchitis, he did not think that smoking caused it. And he had not heard that.

He is 15 and 16. It's 1959, 1960.

And here's Mr. Boeken again. Don't forget, this is the guy who this final argument was designed to show you. He must be full of it because he said, he had never ever, ever heard that cigarettes were harmful to you until 1994.

Of course, he never said any such thing.

I recall that there was news that the cigarette companies had been required to put on a warning. By the government, the Surgeon General, had pushed it through and had to put a warning on the side of cigarettes.

He thought it was political more than anything else.

He thought it was political, it was the government, the Surgeon General was on a vendetta of his own personal stride, he accomplished this small fete. That's what I believe.

I believe the cigarette advertisements, I mean, didn't think there was anything wrong. I believed they were good for you. I believed everyone smoked them, back in the '60's; right. I did not believe they were unhealthy.

[6237]

Did you get information from the tobacco companies that they thought the Surgeon General was all wet and there was no proof whatsoever that cigarettes caused any ill-effect to your health?

Sure.

From the news, I am an advocate of following the news.

Certainly Mr. Boeken, certainly, Mr. Boeken, you say you are a smart fellow and I believe you. You are aware, at least during the 1970's, that early, at least, there was some sort of a controversy about whether or not smoking was truly bad for you, and he says yes.

And he was asked if he came into receipt of information from the tobacco industry, which addressed the Surgeon General's warnings.

And there are a couple of objections in here — here, I am going to read this.

He received information that it was not harmful. It was not addictive. It did not cause health hazards. There was no proof or scientific fact that it causes cancer. Does any of this sound familiar?

Or emphysema or any lung or blood diseases.

For any reasons that have to do [6238] with you as a person, are you typically suspicious of big industry, do you usually trust them?

I am messing up. This isn't an act quote.

Do you generally trust big industry? He said he generally trusts.

Here's an objection.

He believed that when they said it wasn't that large a health hazard, that it was, as far as addictiveness, they knew it had an addiction to it. I was addicted.

But I believed their statements, there was no health risk. And he tells me again I am not sure what year I am dealing with now.

Here's a little question. I know you have got an excuse that you didn't sleep last night and you got chemotherapy and everything and I accept the excuse. But that wasn't my question.

You have already told us about the information that you received from the news media, given the tobacco industry's thought on whether or not the product was harmful, just so we have a clear record, was it your understanding back in the '70's, that the tobacco industry agreed that their product was harmful, that they disagreed that their product was

harmful, or that they were scratching their head and saying, gee whiz, we don't know.

And he said they disagreed that the [6239] product was harmful. He believed them. And he relied upon them.

So this case goes to the jury, goes to you, ladies and gentlemen, on, I think, six different theories. Except for two, they are all different kinds of fraud.

I am not going to show you anything. I am not going to read you anything.

Those things are not bad as far as some of these legal instructions get a little thick. These aren't bad. But the bottom line to all those instructions, I couldn't do it any better than Mr. Leiter did this morning, must have been a representation made to fool me.

You know what, I am going to go with that translation of all of those fraud jury instructions.

Philip Morris must have made a representation to fool people.

And, gee, haven't they admitted it, don't all these documents admit it?

Didn't they lie?

They made a representation to fool people so people would buy their darn product so that they can be filthy rich.

The ten minutes we used this morning to discuss this C.T.R. thing, something I don't really want to talk about a whole lot, and I [6240] want you to remember document number 331, I would appreciate it if someone would write that down because this is the one document that Dr. Hoshizaki was here, no one had ever shown her this particular document and this document is a Philip Morris document, comes right out of their files.

And look at the names, Seligman, Bowling. Bowling is the guy on one of those video tapes who says that, gee, no one knows what causes cancer, maybe the air in New York City that causes cancer.

This is 1976, and we don't know what causes cancer. It's probably the air that we breathe.

Are you listening, Mr. Boeken.

Seligman was the top dog over at research and development who got all these nice memos about destroying documents.

Tom Osdene, director of research. And in 1978 now, 14 years after these organizations had been created, let's stop, why am I spending a little bit of time on this?

Well, there are a couple jury instructions that deal with conspiracy. One conspirator's acts are another conspirator's acts.

If there was a real conspiracy and one did it and one did it, that's what those instructions say, I am not going to put them up and [6241] spend any time on it.

What was the cast of characters? Please look at the frank statement. Look down on the lower left-hand corner. That was their coming out announcement.

That was a Hill & Knowlton announcement.

Here we are, your health is of paramount importance to us.

And nothing has ever been proved.

Philip Morris was right there in that memo.

And Reynolds and Liggett, they were all there.

They were all part of it.

And so they created this T.I.R.C., they didn't have to speak for themselves because they could speak for the T.I.R.C. And they could keep their mouth shut and stand in the background and have T.I.R.C. talk for them.

T.I.R.C. became C.T.R. And T.I.R.C. spun off T.I. And this sounds like military talk.

But they were all members of it. They, meaning the tobacco companies, paid for these organizations. They paid these organizations to take care of them. And let's see what they did.

And unfortunately, as with so many [6242] of these memos, at the outset, no written records, don't distribute anything, one for your files only.

Now can I say it any better than Mr. Seligman said, as a means of introduction, so and so described the history, particularly in relation to C.T.R., it began as an organization called tobacco industry research council. It was

set up as an industry shield in 1954.

That was the year statistical accusations relating smoking to disease were leveled at the industry.

Litigation began, the Wynder, Graham reports were issued.

C.T.R. has helped our legal counsel — the scientific, the scientific, scientific, we are going to find out whether this stuff is really good or not. We are going to find out if it's really bad or not. We are going to find out if Dr. Doll knows what he is really talking about.

C.T.R. has helped our legal counsel by giving advice and technical information which is needed at court trials.

C.T.R. has supplied spokesmen for the industry and congressional hearings.

Remember that 1984 thing?

We have 39 scientists.

And these 39 scientists in 1984 are [6243] still trying to figure out what they were setting up to do in 1954.

The money spent at C.T.R. provides a basis for introduction of witnesses.

Blank feels that, quote, special projects, close quotes, are the best way monies are spent.

On these projects, C.T.R. has acted as a front.

But gee whiz, every once in awhile, they are reluctant to serve that way. And in rare instances, they refused to do it.

There are extraordinarily disturbing documents that I am not going to put up there, that you have got, that talk about the lawyers running the science.

Instead of using science to try to stop from killing people, the lawyers prevent the science to try to stop from losing cases.

People's lives versus litigation.

Science was there, and the lawyers put science on hold, and prevented things from being done because it might mess up their litigation position.

Now, I have used the word disgusting. I used the word "disgusting" because I am trying to be very, very polite here and trying to be very, very low key throughout this trial.

[6244] But that was disgusting.

And your Honor, I have got enough that I think we should take a little break here, if the court doesn't mind.

THE COURT: All right, very well. It's now quarter til. We will take a break until 3 o'clock. Don't discuss the case with anyone.

(AT THIS TIME, A RECESS WAS TAKEN.)

(THE FOLLOWING PROCEEDINGS WERE HELD
IN OPEN COURT IN THE PRESENCE OF THE JURY.)

THE COURT: Our jury panel is back with us. Counsel are present as well.

Mr. Piuze.

CLOSING ARGUMENT (CONTINUED)

BY MR. PIUZE:

So this is October 1969. And you recognize Wakeham's name. So you know this is a Philip Morris document. And Mr. Wakeham, on behalf of Philip Morris says, "32 years ago what I just finished saying, unfortunately, the scientific expertise of the industry, because of the liability [6245] suit situation, has not been permitted to make contribution to the problem. A contribution which I believe was and is vital."

And so the fear someone like me representing someone like Mr. Boeken, in front of some people like you, have kept this industry from doing scientific research, because these people knew what the truth was.

One of the documents that was blown up, we have a small version of it and it goes up to 1980, subjects to avoid, causes of cancer, causes of cancer in humans.

This is beyond the ostrich approach.

Stuff like this is so far off the chart, this should never, ever, be allowed to happen again. Forget the tobacco industry. Any industry, any time.

I started off this afternoon's segment, and I put something up there from Philip Morris or the tobacco industry, I forget which, and I said, gee, our defense of free choice is down the tubes, if we think about the fact that this product is addictive.

So that's what the defendant had to say, whether directly or through its coconspirator.

Here's what Dr. Benowitz had to say. [6246]

I want to take a minute on Dr. Benowitz. I want to take three.

This is the public health segment of our society talking here.

This is as highly respected a person as you will find anywhere in the world.

If there's anyone in the running with him, it's Dr. Doll.

Just so I don't forget, Dr. Doll's, a little bit of his testimony was taken out of context here.

He said, yeah, lighter cigarettes are better when you compare the '60's cigarettes not 1930's cigarettes, don't forget those '30's cigarettes were sent in to him from people around the country of England because he couldn't get any for research. But we ain't comparing '60 cigarettes to '30 cigarettes. We are comparing '60's, so-called light cigarettes, to '60's, not so light cigarettes. That's the comparison.

And that's the comparison that should be drawn.

And that's the comparison there should have been an instruction on, 1930 cigarettes that someone dug out of their seller because they couldn't find any research.

Anyway, here's Neal Benowitz. Neal Benowitz says 15 percent of long-term male smokers [6247] will get lung cancer. People who are addicted to nicotine do not have any clue about how dangerous this really is. They have got no clue about how many people die, they have no clue about what percentage of population gets lung cancer.

They got no idea what the absolute risks are.

Smokers tend to minimize the risks. They may acknowledge it in general but they say, for me, I know I am not — it is going to be all right, it's okay for me to do this. He called it a rationalization and said someone who is

addicted to a drug will keep on using it. They will embrace any idea or any reason. And he is shown the roper exhibit here, Exhibit 330.

And he's asked, you know what — I am going to do this in the second volume. He's asked:

"Q Does addiction interfere with an individual person's perception of the risk?"

And he says:

"It is true of any drug. If a person desires to keep using the drug, and if there are reasons why they shouldn't, health concerns, then the person will look to minimize the health risks. [6248]

"So even if he saw something where there was information -- " excuse me, "so if you see something that has information to the opposite, you'll seize on it. If someone tells you, well, I smoked for a long time and it didn't hurt me, you'll seize on that. If someone says, as long as you don't feel sick, you can keep smoking.

"Anything that allows you to keep taking the drug, you will seize upon it, and that, in a sense, is minimizing the risk. And this has been studied by asking smokers how hazardous they think smoking is. And most smokers think that, one, it's more hazardous for someone else, they don't have an accurate idea how hazardous it is compared to other things, other sorts of hazards, smokers perceive the risks of smoking to be less than non-smokers do."

And I showed him, would this help an individual tobacco or nicotine addict give himself or herself a rationale for smoking?

Reading the words that we have seen here so many times, it is not known whether smoke has a role in development of various diseases. [6249]

And he says, sure, it would. It provides doubt.

Let's stop. It provides doubt, what a coincidence, about whether the health risks that they have heard from other sources is accurate. And when the doubt exists, the smokers will assume the best.

The best for them is what justifies them smoking.

Here's another one.

Great deal more research is needed to uncover the causes and mechanisms involved in the onset of these diseases.

Sure, that helps a smoker rationalize.

Well what about a well respected, high powered, high-ranking head of one of the major corporations in the United States, swearing to the United States Congress that on the issue of doesn't your tobacco cause lung cancer, how about that person saying I don't know what causes lung cancer.

And he said sure.

Look, I have just beat that to death. They said they were going to give misinformation. They said they were going to give disinformation. They said that they were going to create doubt. They created doubt.

They created doubt. People bought [6250] into it. People still buy into it. People die, they make money. They make money, people die.

They tell the truth, people won't die, they won't make money.

If they really stop selling to minors, they won't make money.

And yet Mr. Bible said, most important thing to us is making money.

So he's in a dilemma. Philip Morris is in a dilemma.

I think Philip Morris is in not just — Philip Morris is not just denying.

One more thing and I am done with Dr. Benowitz here.

This is on light cigarettes.

"The manufacturers, registered lower yields on machines, they didn't manufacture cigarettes that exposed the smoker to lower yields. Since the 1950's, tar," that's what I am interested in, "tar yields of cigarettes have dropped," and he says "as tested on smoking machine, not in people."

Don't forget, one of the product — one of the product liability prongs here is what is called consumer expectations. Consumer expectations is therefore [6251] light cigarettes.

Would an ordinary consumer believe, since the 1950's, that light cigarettes are better for them, and obviously the answer is yes. And do the manufacturers and the government know the whole time that it was phony? And obviously, the answer is yes.

Because they have known all along, the defense lawyers brought it out with my witnesses. The defense lawyers brought it out with their own witnesses.

The government and the industry has known all along, that smokers take light cigarettes and compensate and do just as much poison when they smoke those things as if it was a full strength cigarette.

There's only one little group that didn't know and it was the people that was taking them in.

We are talking 1950's here.

Now, this warning issue what should have been washed about, what instructions should have been given, telling people don't puff so deep, don't take too much puffs, don't cover up those holes, that's fair game until July 1, 1969.

So that's the consumer expectation sheet. I am going to finish by 4 o'clock. [6252] I don't care if I am in the middle of a word, I am going to finish at 4 o'clock, or otherwise.

How about this case being about something really complicated like right and wrong? Okay.

We had a little discussion someplace along the line on right and wrong. And I think we were told by one of the defense witnesses that corporations would be fools to think they know right or wrong. They would be fools to believe

that they knew right or wrong. They would be fools to listen to them.

Wrong.

That ain't right. That's wrong.

Philip Morris, the biggest, is a bully.

And when the boss writes that no matter who comes after us, we are going to out muscle and out gun them, out whatever them, that's a bully tactic.

I am going to ask you all again, in a bit, to compensate my guy, Richard Boeken, and to punish them, really punish them, really punish them.

And I want to tell you about billies. The bigger the bully is, the harder the bully falls.

But the bully don't fall unless you [6253] smack them first, hard.

The only thing these guys care about, the only thing these guys respect, is their profit. And it says so right in that document that you are going to have, that's highlighted in pink.

That's all they care about is their profit.

Ms. Merlo came in here, basically, says, you know what, we didn't really disagree with the Surgeon General, we sort of kept our mouth shut, we sort of kept to ourselves.

And for me, that's the cover up of the cover up.

The 1954, when they made these organizations, that's when the cover up started.

Now that it's all unwound, they are going to pretend it never happened.

Well, we didn't really disagree with the Surgeon General. We were just sort of quiet.

Well, we sort of kept to ourselves.

Well, b[a]loney.

Talk about Richard, talk about damages. Sit down.

Here's a conversation he had with Dr. Trabulus. Quoting Dr. Trabulus.

I'd tell you to stop, but I am not going to, take it for what it is. That would be [6254] Dr. Trabulus. In his office, for a physical exam.

Did he explain what he meant.

No. But I understood him.

What was your understanding as to what was meant by that?

That he wasn't going to give me a speech.

And in fact, I asked Dr. Trabulus, he was here for a very short period of time, but I asked him, did you lecture him, do you lecture your patients, and he said no.

But there can be no doubt that Mr. Boeken spoke to Dr. Trabulus, because he got nicorette gum. He got nicorette patches. He couldn't get that stuff without prescription. He actually couldn't. There is no doubt he discussed that.

Dr. Trabulus, when he came in here, told you that Mr. Boeken raised health concerns with him, these prescriptions resulted.

We know that in the year that he first saw Dr. Trabulus, he quit for 45 days.

Mr. Boeken didn't ostrich. He tried to quit. He tried to quit.

He tried to quit.

And I suggest that one of the reasons he was not successful is because, unlike the other two, he wasn't so sure that this stuff [6255] was so bad.

And the reason he was sure he knew it wasn't good for his bronchitis, and it wasn't good for his wind. When it came to the issue of lung cancer, when it came to the issue of killing him, these guys put that stuff out year after year after year after year, creating doubt. He bit.

So this is the third and last time I will say, in this case, Richard Boeken's sin is that he believed them.

He hooked for that line just like he did for nicotine. And the incredible, ultimate irony about this case, there's two of them; one, the people should be smarter than our scientists; two, if they believed us, they are fools.

I have said what I want to about this stuff here. I am not going to show, if I believe — excuse me — it is my position that with all the money, time, effort, brain power, and marketing and advertising that was spent on this situation over the course of decades, that it is hypocrisy to find fault with Mr. Boeken for buying into it.

I acknowledge that some of you might think that he should not have trusted Philip Morris.

I acknowledge that's a possible argument in the jury room. [6256]

I put this up, 377, just to remind you about it.

That if that's true, the scorpion does not walk. Philip Morris does not claim he was negligent. Philip Morris doesn't claim any reduction. They say, all or nothing.

Okay. Your choice.

Mr. Boeken was part at fault for believing the scorpion. The scorpion pays the price. Because the scorpion is at least a concurring cause and nothing would have happened without the scorpion.

Here's how I think you should compensate Mr. Boeken. Here's why. You know what, there was very little talk about that, so I will do very little talk about that.

I have told you the numbers that I had in mind. And I haven't heard a disagreement.

He worked hard. He was successful. He is not going to get to enjoy the fruits of his labor.

He has a loving wife. He is not going to get a chance to take care of her.

He took care of his mother until the day she died.

That's all the history for now. The amount of money that I explained as far as what's called special damages,[6257] the medical, the wage loss, there's hard documents to back those things up.

The amount of compensation that I mentioned as far as what's called general damages, you remember what he said in the deposition about what that treatment did to him.

And the fact that he's not going to be around. I chose a number, I don't want it to be too high, because I don't want to lose credibility with the jury. I don't want to be too low, because I don't want to stiff my client. So I choose sort of a number that I think is palatable. It's not necessarily a pride of authorship there. It's a range.

I haven't heard any contradictory suggestion, so I move on to this: this case here has been 47 years in the making.

Some of the stuff that's been said here, some of the documents that you have seen here, some of the information that's been recorded here, is stuff that we should all be ashamed of, not just Philip Morris, I am ashamed of it.

Our government has got three branches, executive, legislative, judicial.

We here, now, us, represent the judicial branch of the government for this case.

The three branches of the government are supposedly equal. [6258]

That's the way it was created.

And so for this case, we, are equal to the executive and the legislature.

They have got proposals about what they want to do a public opinion and litigation and legislation and on and on and on.

We are an equal part of the government. Now. Here.

How do you say to any manufacturer out there of anything that if they ever do anything like this remotely close to this again, that it can't conceivably be tolerated?

Well, there's only one way it can be accomplished judicially, money. Punitive and exemplary damages. And there's only one thing that they care about, admittedly, money. And so it's got to hurt.

A slap on the wrist is a joke. It's a laugh. It's an insult. It's an insult to all of the people who have been victimized over the years. And it's an insult to the people, to former smokers who, whenever they start coughing say, uh-oh.

So I want to just remind you of the analysis, because he mentioned this morning about some numbers here.

If the average person makes 50,000 bucks, when the average person doesn't, and if this [6259] company makes over five billion a year, which it does, the multiplier is a hundred thousand to one. A cup of coffee is a hundred thousand bucks. Parking in the building is a million one bucks.

If the average person makes \$25,000 a year, which is low, double those figures, a cup of coffee is \$200,000 for Philip Morris. Parking in the building is two million dollars

for Philip Morris. And the number is someplace between those two.

Taking my kid's allowance away from her for an infraction in the rules that she's got to abide by, one week's allowance, to her, for something small is 100 million dollars to them.

100 million dollars punitive and exemplary damage award here is taking my kid's allowance away for a week.

Slap on the wrist.

I put some numbers up here. I don't want the numbers so much right now. And I am going to cover up the numbers because right now I am not into the numbers.

I heard, on Friday, about Philip Morris's change of heart, and here's what I believe about Philip Morris's change of heart.

We were made to — ms. Merlo, quoting, Friday, little bit this morning.

It took too long for us to change [6260] our position. It cost us, the company, dearly. It cost us, the company, credibility. It cost us, the company prestige, and it cost us, the company, criticism.

Tough luck.

It's us, us, us.

I didn't hear her say, well, now that we are admitting that our product causes cancer, it cost Joe Smith this, or Josephine Jones that, or Richard Boeken that.

That's not part of the new Philip Morris deal.

It's what it costs us.

Well, that's what I wrote there last week. See, that's a just us punitive damage award.

That's an I will take my kid's allowance away for one measly week for a minor infraction. That's what that is.

The profits of Philip Morris, I said I wasn't going to pick this up, I take it back.

5.35 billion dollars in 2000. That's the tobacco company. That's what we are interested in.

If there was a way that I could say to you, put a stake through its heart, kill it, I would, dead. But I can't. It's not the law.[6261] There's no civil death penalty, that cannot be

done.

If I could, I would.

That emblem out there where some of you jurors have sat at one time or another, and I mentioned it, lady justice doesn't have a piece of paper. And she doesn't have a tooth pick. And she doesn't have a ruler there to go (indicating).

She's got a sword.

Now, I say, two years profits, and I am not joking. Thanks.

I am done.

THE COURT: Thank you, counsel.

* * *

APPENDIX B**EXCERPT FROM BRIEF OF
RESPONDENT AND CROSS-APPELLANT**

Boeken v. Philip Morris Incorporated
(Cal. Ct. Appeal, 2d Dist., Div. 4, No. B152959),
filed April 1, 2003

Part II, product liability, pp. 39-44

* * *

[39]

**II. SUBSTANTIAL EVIDENCE SUPPORTS
THE PRODUCT LIABILITY FINDING****A. Philip Morris Does Not Contest Product
Liability Based on Failure to Warn**

Philip Morris has waived the ability to contest the jury's product liability finding. The jury was charged that it could find for Boeken on his products [40] liability claim based on *either* "a defect in design or a failure to adequately warn the consumer prior to July 1, 1969 of a hazard involved in the foreseeable use of the product." RT 6277-78 (emphasis added). Philip Morris attacks the sufficiency of the evidence solely on the design defect theory. AOB at 32-38. It leaves the warning defect theory unaddressed.¹⁹ A judgment that is correct on any theory will be affirmed, and any argument that the evidence is insufficient to support liability on a particular theory must be included in the appellant's

¹⁹ AOB at 32-38 is limited to the argument that Boeken failed to prove a design defect under "either the 'risk benefit' or the 'consumer expectations' tests," and at most established "that cigarettes are inherently dangerous," so that "Philip Morris is entitled to judgment as a matter of law on plaintiff's design defect and negligence claims." AOB at 33.

opening brief or is waived. See pp. 33-34, *supra*.

Even if this Court were to overlook the waiver rule, the evidence was sufficient for the jury to find a warning defect. RT 6279-81. The jury was charged in relevant part that it could find a warning defect if Philip Morris had "a duty to warn of danger and fail[ed] to provide an adequate warning of those dangers prior to July 1, 1969," which turned on: (1) whether "use of the product in a manner that is reasonably foreseeable by the manufacturer involves a substantial danger that would not be readily recognized by the ordinary user of the product," and (2) whether "this danger was known . . . at the time of the manufacture and distribution." RT 6280-81. [41]

Philip Morris knew of two distinct dangers posed by its Marlboro cigarettes of which ordinary consumers were unaware. First, the product it was actually selling was nicotine, an addictive drug, and it used chemical and other manipulations to make its cigarettes more addictive than unadulterated tobacco. Philip Morris was required to warn potential purchasers that its Marlboro cigarettes contained carefully manipulated levels of nicotine that quite likely would turn them into addicts. Second, Philip Morris knew of specific carcinogens in its cigarettes (more than 40) that in the view of its scientists made them medically unsafe. Philip Morris was required to warn potential purchasers of these known dangers as well.

There is no evidence that prior to July 1, 1969, Philip Morris warned of any of these dangers. Philip Morris was required to warn of these dangers to give Boeken and other consumers "the option either to refrain from using the product at all or to use it in such a way as to minimize the degree of danger . . . in order to provide 'true choice'" to consumers. *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1003. See also *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1113. If Boeken had been warned of these dangers in the 1960s he would have stopped smoking, see CT 13564-64A, so the failure to warn was a legal cause of his injuries. [42]

**B. The Product Liability Finding May
Also Be Affirmed Based on Design Defect**

Philip Morris's waiver on the warning defect theory means that its arguments on design defect are irrelevant and need not be addressed. But if it were necessary to reach the design defect theory, this Court should affirm based on both the risk-utility test and the consumer expectations test.

Risk-Utility Test. Philip Morris contends that the risk-utility test for design defect fails because Boeken did not prove the existence of excess *preventable* danger remediable by a safer alternative design. AOB at 34-36. To the contrary, as an expert witness Boeken called William Farone, one of Philip Morris's former top scientists in charge of research into safer cigarettes. RT 1500-01, 1516, 1522, 1594-97. Farone testified that Philip Morris could quite feasibly have designed its Marlboro brand so that a smoker would ingest "virtually no tar," and hence virtually no carcinogens, RT 1534-37, a clearly safer, even though not "absolutely safe," design. RT 1594. Indeed, in the late 1970s Philip Morris designed another of its brands, Cambridge, to deliver zero tar. RT 1570-77 (Farone). As new versions of the Marlboro brand were introduced to the market, Boeken switched to the lowest-tar Marlboro cigarettes offered by Philip Morris in an effort to curb his bronchitis, *see* CT 13560, and it is reasonable to infer that Boeken would have switched to a version with virtually no tar, and hence virtually no cancer risk, if Philip Morris had designed Marlboro to eliminate this excess preventable danger. [43]

Consumer Expectations Test. An independent basis for a finding of design defect is the consumer expectations test. Philip Morris does not address the dispositive evidence. It argues that the consumer expectations test fails because the fact that cigarettes, in general, cause lung cancer was common knowledge in the community. As the trial court noted, days of testimony were presented on each

side on the common knowledge issue, which is enough to defeat this argument. See p. 32, note 11, *supra*. More specifically, however, Philip Morris ignores the evidence that ordinary consumers, including Boeken, had an expectation that the design of low-tar, so-called "light" cigarettes, meant that they posed a lower health risk than regular cigarettes. CT 2040 ("Most smokers think that low-yield cigarettes are less hazardous."); CT 13560. Yet the "light" cigarettes consumed by Boeken and vast numbers of other smokers were patently defective when compared with this consumer expectation. They did not perform as safely as an ordinary consumer would expect because, unknown to the consumer, *in actual use* they delivered just as much tar, and hence carcinogens, to the lungs of the smoker — as Philip Morris was fully aware by the mid-1970s, but never informed consumers.²⁰

The jury's finding against Philip Morris on the product liability claim was entirely sustainable based on the warning defect theory, as Philip Morris does not contest. It may also be upheld based on both design defect theories. Philip Morris provides no basis for overturning the jury's product liability findings.²¹

²⁰ When he joined Philip Morris in 1976, Farone learned that the company had elaborate procedures for testing the true amount of tar consumed by smokers of its so-called "light" cigarettes that were marketed based on low-tar statistics as measured by the FDA's smoking machine. Philip Morris had discovered that these "light" cigarettes were no safer than regular cigarettes because of how smokers circumvented their design to obtain the nicotine dose they needed. See RT 1537-40. It was explained to him that Philip Morris's studies of humans showed that "people don't smoke the way a machine does," and that using a "human smoker [44] simulator" it invented, Philip Morris was able to determine "it's easy for the smoker to defeat the purpose of a low tar cigarette" by sucking harder on it, covering ventilation holes, and taking more puffs. RT 1538-40. See also RT 1484-85, 1563-68, 1937-38, 1941-42, 1973-74, 2039-40, 2311, 2337-38; Ex. 120 at 1-3; Ex. 9426 at 9-10.

²¹ Alleging instructional error, as a fallback Philip Morris urges a new trial on the product liability claim. AOB at 39-40. It complains that the instruction on the risk-benefit test for design defect did not sufficiently focus the jury's attention on the risks and benefits of *the design* of the

cigarette, so that the jury might have found design defect liability based on the risks and benefits of *cigarettes generally*. The instruction was perfectly clear as is. There could not have been a tighter focus on the risks and benefits of *the design*; indeed, the word "design" appears thirteen times in the instruction. RT 6278-79. Further, in argument to the jury, both parties carefully focused the jury's attention on the risks and benefits of *the design*. RT 5991-96, 6167-73.

Philip Morris contends that "the instruction told the jury that a safer alternative design was only one of the factors that the jury "may consider, among other things, to determine if the risk-benefit test was satisfied." AOB at 40. But the other five factors the jury was permitted to consider were all proper (for example, some would have permitted the jury to rule for Philip Morris even if it found that a safer alternative design existed), and none suggested it would be permissible for the jury to consider the overall risks and benefits of *cigarettes generally*.

Philip Morris specifically complains that the trial court did not charge the jury pursuant to BAJI 9.00.6. AOB at 39 (citing CT 9958). Philip Morris was not entitled to this instruction. The use note in the 1994 edition of BAJI states that "BAJI 9.00.6 applies to all products liabilities actions pending or commenced on or after January 1, 1988," pursuant to the 1987 amendment to Cal. Civil Code § 1714.45 — which, well before trial, was repealed with respect to tobacco. See pp. 78-88, *infra*. This use note has been replaced in the 2002 edition of BAJI with the following statement: "Manufacturers of tobacco products are not exempted from product liability." Given the 1997 repeal of the 1987 amendment to Section 1714.45, Philip Morris was not entitled to have the jury instructed pursuant to BAJI 9.00.6, as the current use note confirms.

FEB 28 2006

OFFICE OF THE CLERK

(5)
No. 05-594

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

JUDY BOEKEN, AS TRUSTEE, ETC.,

Respondent.

**On Petition for a Writ of Certiorari to
the California Court of Appeal**

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
I. REVIEW IS WARRANTED TO RESOLVE THE SPLIT AMONG THE LOWER COURTS AS TO WHETHER FEDERALLY MANDATED LABELING REQUIREMENTS PREEMPT "CONSUMER EXPECTATIONS" CLAIMS.	1
A. The Preemption Question Is Important And Worthy Of Review.	1
B. The Preemption Question Is Squarely Presented.	3
II. CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURTS HAVE SYSTEMATICALLY IGNORED <i>STATE</i> <i>FARM'S</i> GUIDANCE REGARDING THE CONSTITUTIONAL LIMITS ON PUNITIVE AWARDS WHERE COMPENSATORY DAMAGES ARE SUBSTANTIAL.	6
CONCLUSION	7

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Bates v. Dow Agrosciences LLC</i> , 125 S. Ct. 1788 (2005)	2
<i>Orr v. Orr</i> , 440 U.S. 268 (1979)	3
<i>State Farm Mut. Auto Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	6
<i>Va. Bankshares, Inc. v. Sandberg</i> , 501 U.S. 1083 (1991)	3
<i>Williams v. Philip Morris Inc.</i> , 2006 WL 242456 (Or. Feb. 2, 2006)	6, 7

MISCELLANEOUS

Robert L. Stern et al., SUPREME COURT PRACTICE (8th ed. 2002)	3
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REPLY BRIEF FOR THE PETITIONER

Respondent acknowledges that the questions presented by the petition are worthy of review. Nonetheless, she raises a number of points that warrant a brief response.

I. REVIEW IS WARRANTED TO RESOLVE THE SPLIT AMONG THE LOWER COURTS AS TO WHETHER FEDERALLY MANDATED LABELING REQUIREMENTS PREEMPT "CONSUMER EXPECTATIONS" CLAIMS.

Although respondent does not oppose a grant of review on the preemption question, see Resp. at 1, she alludes to a potential "vehicle" problem, incorrectly suggesting that her trial counsel may not have argued that petitioner should be held liable and punished for failing to warn about the specific dangers of Marlboro Lights. Respondent then concedes that perhaps this is not a problem at all, because "possibly the preemption issue itself does not hinge on" whether such arguments were made at trial. Resp. at 1.

There is no vehicle problem; the preemption question is properly presented and highly certworthy.

A. The Preemption Question Is Important And Worthy Of Review.

In our petition we made the following points, not one of which respondent disputes:

- The lower courts are in substantial disagreement over the question whether "consumer expectations" claims are preempted by federally mandated labeling requirements. Pet. at 8-9.
- The conflict between the Ninth Circuit and the California state courts is particularly troublesome because it will lead to forum shopping and will produce different results depending on whether

the case happens to be adjudicated in state or federal court. Pet. at 10.

- The Court of Appeal in this case allowed respondent to avoid federal preemption simply by recasting a failure-to-warn claim as a claim that the product did not – as a result of inadequate warnings – meet consumer expectations regarding safety. Pet. at 4.
- If the split in authority on this question is permitted to continue, cigarette manufacturers will, notwithstanding Labeling Act preemption, be forced to provide additional warnings with their low-tar cigarettes in California or risk exposure to massive compensatory and punitive liability. Pet. at 10.
- Whether design defect claims predicated on consumer expectations are preempted is a question that has enormous ongoing importance for all manufacturers of products subject to federal preemption in the many jurisdictions that have adopted the consumer expectations test. Pet. at 5.

Given those undisputed – and, we submit, indisputable – propositions, the preemption question plainly merits review.

Respondent also does not dispute that the ruling below is fundamentally inconsistent with this Court's recent decision in *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1799-1800 (2005), issued subsequent to the Court of Appeal's decision, which held that federal preemption turns on the inherent nature of the plaintiff's claim and not on how that claim is styled. See Pet. at 7-8. Thus, at a minimum, the case should be GVR'd for further consideration in light of *Bates*.

B. The Preemption Question Is Squarely Presented.

Respondent's allusion to a "potential defect in the petition," Resp. at 1, is mystifying, as she does not dispute that the question whether the Labeling Act preempts consumer expectations claims was raised in, considered, and ruled upon by the Court of Appeal.

That court expressly stated that "[p]roduct liability under a failure-to-warn theory is a distinct cause of action from one under the consumer expectation test" and held that, as a result, federal preemption did not apply to the latter. Pet. App. at 29a. Whether that holding was correct – whether Labeling Act preemption becomes inapplicable simply because a cause of action is cast in terms of "consumer expectations" – is the question presented by the petition.

There thus is no doubt that the federal question is properly before this Court. See, e.g., *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented * * *"); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) ("it is irrelevant to inquire * * * whether a Federal question was raised in a court below when it appears that such question was actually considered and decided." (internal quotation marks omitted)); Robert L. Stern et al., *SUPREME COURT PRACTICE* 185 (8th ed. 2002) (in such circumstances "[a]n irrebuttable presumption is created that the federal question was timely and properly raised") (citing cases).

Respondent's "concern" (Resp. at 30), however, appears to be that review "*might be unwarranted to the degree that three statements made in the petition * * * turn out to lack support in the record, at least if any lack of support for these statements is material to the legal arguments PM would make if review were granted.*" Resp. at 29 (emphasis added). (The three statements in the petition to which respondent refers pertain to whether she contended below that petitioner should be held liable for failing to warn about the dangers of Marl-

boro Lights.)¹ But (a) the statements in the petition singled out by respondent are fully supported by the record; and (b) it would not matter if they were not, because they are immaterial to the question presented.

1. The record amply demonstrates that in the courts below respondent contended that petitioner should be held liable and punished for failing to give certain warnings regarding Marlboro Lights cigarettes—a product that was not introduced until 1971, well after the effective date of the Labeling Act's preemption provision. For example, in closing argument, respondent's counsel said:

One of the causes of action here has to do with a failure to instruct, a failure to instruct on how to use a product. If these things really weren't lower tar, shouldn't the consumers have been told when these things came out, when they came out in the '60's, shouldn't the consumers have been told, hey, if you are going to use these things, watch where you put your hands. If you are going to use these things, don't puff so deeply. If you are going to use these things, don't puff more often. If these things are going to be of any value, I mean, if you are going to both using these, instead of these, you have to smoke them in a different way. Everyone knew except the consumer. And so one of the claims in this case is that Philip Morris, when they marketed these cigarettes, should have told the consumer what Philip Morris knew and what the government knew. And they should have done it when these things first came out in the '60's. And it doesn't matter, in this case, that Mr. Boeken didn't start using these things until the '70's, because if

¹ At respondent's request, petitioner provided, by letter to counsel, the very record citations she now claims to lack. As she does not challenge those citations, presumably she found them satisfactory.

that information had been put out, and if that information had been put out commonly, at least everyone would have known what they were doing when they bought these things. *That was never, ever, ever done.*²

RT 5968-70 (emphasis added).

Similarly, in her brief to the California Court of Appeal, respondent contended:

[T]he "light" cigarettes consumed by Boeken and vast numbers of other smokers were patently defective when compared with this consumer expectation. They did not perform as safely as an ordinary consumer would expect because, unknown to the consumer, in actual use they delivered just as much tar, and hence carcinogens, to the lungs of the smoker – as Philip Morris was fully aware by the mid-1970s, *but never informed consumers.*

Boeken Ct. App. Br. 43 (emphasis added). Respondent's insinuation that her consumer expectation claim did not rely on petitioner's post-1969 failure to warn about the dangers of light cigarettes is accordingly baseless.³

2. In any event, this Court need not concern itself with the details of the record because the issue that has divided the lower courts would still be squarely presented even if re-

² Petitioner of course disputes that it ever concealed any information about low-tar cigarettes, but that issue has no bearing on the question presented.

³ Respondent does not (nor could she) dispute that the consumer expectations theory was in fact submitted to the jury, or that the jury was permitted to base its verdict on that theory. Nor does she dispute that Marlboro Lights did not exist until after 1969, so that any failure to warn consumers about erroneous expectations would have occurred after preemption went into effect.

spondent's trial and appellate counsel had not argued as they did. The question presented is whether "states may use a 'consumer expectations' theory to impose liability for failure to provide warnings about the dangers of smoking beyond the warnings mandated by Congress." Pet. at (I). The Court of Appeal addressed this question on the merits and answered "yes." As noted above (see p. 3, *supra*), it is thus indisputable that the preemption question is properly before this Court.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURTS HAVE SYSTEMATICALLY IGNORED STATE FARM'S GUIDANCE REGARDING THE CONSTITUTIONAL LIMITS ON PUNITIVE AWARDS WHERE COMPENSATORY DAMAGES ARE SUBSTANTIAL.

Respondent "agrees this Court should grant review of the punitive damages judgment to address the important conflicts among the lower courts as to the proper application of the due process framework for 'gross excessiveness' review of punitive damages in the aftermath of this Court's decision in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003)." Resp. at 24. Respondent's discussion (at 25-28) of decisions that have come down since the filing of our petition illustrates the extent to which the confusion in the lower courts is only getting worse. Guidance from this Court is sorely needed.

One of the decisions discussed by respondent – *Williams v. Philip Morris Inc.*, 2006 WL 242456 (Or. Feb. 2, 2006) – merits particular note. Petitioner here will soon be filing a petition for certiorari seeking review of that decision, which approved reinstatement of a jury's award of \$79.5 million in punitive damages, an amount approximately 97 times the

compensatory verdict rendered by the jury.⁴ Although recognizing that the ratio requirement was "not met," the Oregon Supreme Court in that case held that no remittitur was warranted because reprehensibility was deemed high. In essence, the *Williams* court held that, in cases of high reprehensibility, the ratio guidepost may be entirely disregarded and imposes no constraint on the size of a punitive damages award. *Williams* had been GVR'd by this Court for further consideration in light of *State Farm*. The Oregon Supreme Court's willingness on remand to uphold the gargantuan award flies in the face of that decision.

The punitive damages questions that will be presented in the petition for certiorari in *Williams* will overlap with and complement the excessiveness issue presented here. For example, *Williams*, like this case, implicates the question of how and when harm to non-parties can be considered in assessing punitive damages. The awards in both *Williams* and this case go to single individuals, and both awards were largely predicated on harm to others. Similarly, *Williams*, like this case, raises the issue of how lower courts should give effect to this Court's suggestion in *State Farm* that, where compensatory damages are substantial, a 1-to-1 ratio may reach the limit of due process. Accordingly, this Court might wish to re-list this petition in order to consider it along with the petition in *Williams*, which will be filed in time to be acted upon this Term.

CONCLUSION

The petition for a writ of certiorari should be granted.

⁴ Indeed, the ratio in *Williams* is 152:1 if the statutorily capped amount of compensatory damages that respondent would actually receive is used as the denominator.

Respectfully submitted.

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FEBRUARY 2006

**In The
Supreme Court of the United States**

PHILIP MORRIS USA INC.,

Petitioner

v.

JUDY BOEKEN, AS TRUSTEE, ETC.

**On Petition For Writ Of Certiorari
To The Court Of Appeal Of California**

**BRIEF FOR THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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December 15, 2005

TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
REVIEW IS WARRANTED BECAUSE THE RULING BELOW CONTRIBUTES TO AN ON-GOING DIVISION IN THE LOWER COURTS AND INCREASES THE RISK OF UNCONSTITUTIONALLY EXCESSIVE PUNITIVE DAMAGES, ARBITRARY DEPRIVATION OF PROPERTY, AND MULTIPLE PUNISHMENTS	4
A. The Decision Below Joins A Growing Line Of Cases That Ignore <i>State Farm's</i> Holding And Adopt A Single-Digit Safe Harbor, Regardless Of The Substantiality Of The Compensatory Damages.....	6
B. The Decision Below Ignores <i>State Farm's</i> Holding And Rationale By Upholding A Punitive Damages Award Based On Alleged Harms To Individuals Not Parties To The Case.....	11
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
CASES:	
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996)	5, 15
<i>Boerner v. Brown & Williamson Tobacco Co.</i> , 394 F.3d 594 (8th Cir. 2005)	7, 12
<i>Bogle v. McClure</i> , 332 F.3d 1347 (11th Cir. 2003)	9
<i>Chicago Title Ins. Corp. v. Magnuson</i> , 2005 WL 2373430 (S.D. Ohio Sept. 26, 2005)	9
<i>Cooper Indus., Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001)	5
<i>Geier v. American Honda Motor Co.</i> , 529 U.S. 861 (2000)	14
<i>Greenberg v. Paul Revere Life Ins. Co.</i> , 2004 WL 74630 (9th Cir. Jan. 12, 2004)	8
<i>Hangerter v. Provident Life & Accident Ins. Co.</i> , 373 F.3d 998 (9th Cir.), <i>cert. denied</i> , 542 U.S. 939 (2004)	9
<i>Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.</i> , 2005 WL 2043633 (Ky. Aug. 25, 2005)	9
<i>Maya B. v. Vogel</i> , 2004 WL 551325 (Cal. Ct. App. Mar. 22, 2004)	9
<i>Motorola Credit Corp. v. Uzan</i> , 388 F.3d 39 (2d Cir. 2004), <i>cert. denied</i> , 125 S. Ct. 2270 (2005)	8
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999)	13
<i>Pacific Mut. Life Ins. Co. v. Haslip</i> , 499 U.S. 1 (1991)	5, 6
<i>Planned Parenthood v. American Coalition of Life Activists</i> , 422 F.3d 949 (9th Cir. 2005)	9

TABLE OF AUTHORITIES – Continued

	Page
<i>Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.</i> , 345 F.3d 1366 (Fed. Cir. 2003).....	9
<i>Roginsky v. Richardson-Merrell, Inc.</i> , 378 F.2d 832 (2d Cir. 1967).....	13
<i>Romo v. Ford Motor Co.</i> , 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003).....	9
<i>State Farm Mut. Automobile Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	passim
<i>TVT Records v. Island Def Jam Music Group</i> , 279 F. Supp. 2d 413 (S.D.N.Y. 2003), <i>rev'd on other</i> <i>grounds</i> , 412 F.3d 82 (2d Cir. 2005).....	10, 11, 15
<i>TXO Prod. Corp. v. Alliance Res. Corp.</i> , 509 U.S. 443 (1993)	5
<i>Watson v. E.S. Sutton, Inc.</i> , 2005 WL 2170659 (S.D.N.Y. Sept. 6, 2005).....	11
<i>Williams v. ConAgra Poultry Co.</i> , 378 F.3d 790 (8th Cir. 2004)	7, 10
<i>Zhang v. American Gem Seafoods, Inc.</i> , 339 F.3d 1020 (9th Cir. 2003), <i>cert. denied</i> , 541 U.S. 902 (2004)	8
 CONSTITUTION:	
U.S. Const., Amend. XIV, § 1 (Due Process Clause).....	passim
 MISCELLANEOUS:	
Jack B. Weinstein & Margaret A. Berger, <i>Weinstein's</i> <i>Federal Evidence</i> (2d ed. 2005)	13

**BRIEF FOR THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

The Chamber of Commerce of the United States of America (the Chamber) respectfully submits this brief as *amicus curiae* in support of the petition for a writ of *certiorari* in this case.¹

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations. It has an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. One important function of the Chamber is to represent the interests of its members by filing briefs as *amicus curiae* in cases involving issues of national concern to American business.

The Chamber is filing the instant brief to address the second question presented by the petition, which raises recurring issues about the proper application of the substantive standards for constitutional review of awards of punitive damages that are of great concern to the Chamber's members.² The decision of the California Court of Appeal that petitioner asks this Court to review has further undermined the goals of precluding arbitrary and excessive punitive damages awards and of ensuring the national uniformity and fair notice that underlie this Court's decisions applying the Due Process Clause to

¹ Letters from petitioner and respondent indicating their consent to the filing of this brief are being filed with the Clerk of this Court along with this brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

² *Amicus* does not address in this brief the first question presented regarding the preemptive scope of federal law.

punitive damages awards. The Chamber therefore respectfully urges the Court to grant the petition for a writ of *certiorari* and to review and reverse the California Court of Appeal decision in this case, which sustained a \$50 million punitive damages award against a single defendant in favor of a single plaintiff.

INTRODUCTION AND SUMMARY OF ARGUMENT

The failure of the California Court of Appeal to abide by the holding and rationale of this Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), both exemplifies and increases the risk of grossly excessive punitive damages awards that further no legitimate purpose and constitute the "arbitrary deprivation of property" against which *State Farm* warned. *Id.* at 417. The \$50 million award of punitive damages imposed by the Court of Appeal in this case reflects just such arbitrary action, particularly in light of the already huge compensatory award of \$5.5 million, and the fact that the punitive damages are based in part on purported harm to persons not before the trial court who can bring suit in their own right to attempt to recover for their own alleged damages from petitioner and whose cases might differ in material respects from that of respondent.

A. The California Court of Appeal's punitive damages award appears to be based on a mistaken view that any single-digit ratio between punitive and compensatory damages necessarily satisfies the second constitutional guidepost set forth in *State Farm*, which measures "the disparity between the actual or potential harm suffered by the plaintiff," *i.e.*, the compensatory damages, and "the punitive damages award." 538 U.S. at 418. This approach rests, in effect, on a misreading of *State Farm* as establishing a "single-digit safe harbor" and is shared by several other courts. By contrast, some lower courts correctly understand that *State Farm* established no such safe harbor. Those courts, when reviewing the ratio between compensatory and punitive damages, take into account the

extent to which the compensatory damages in a particular case already include a punishment component or may already serve as a significant deterrent. Consideration of the amount and impact of the compensatory damages in the circumstances of a specific case serves as an important constitutional check on the punitive damages awards in those jurisdictions. That constitutional limit is being ignored in the jurisdictions that rely on a single-digit safe harbor.

That safe harbor approach exacerbates the absence of substantial uniformity across the country, eliminates fair notice to defendants, and undermines the due process safeguards that *State Farm* aimed to effectuate. It will encourage greater forum shopping by plaintiffs in cases against defendants engaged in nationwide commerce. That is especially true where, as here, it is not only the state court that misreads *State Farm*, but also the regional federal court of appeals. In California, where both state courts and the Ninth Circuit generally apply *State Farm* only as setting a single-digit outer limit, large interstate defendants can find no relief from the erroneous application of due process protections through removal to federal court.

B. This case also demonstrates the greater risk of unpredictable, arbitrary punitive damages awards that arises when, contrary to *State Farm*, a court allows a punitive damages award to be based on consideration of purported harms to individuals who are not parties to the case. There is an increased likelihood that the defendant will be substantially punished for conduct that either (1) will never be found by another jury to give rise to liability under governing legal standards or (2) will be the subject of a punitive damages award by another jury in an amount that fails to take into account that the same defendant has already been punished for the same conduct and harm in the earlier case. The first scenario of punishment for unproven liability is likely when an issue such as reliance or contributory negligence is relevant and will necessarily vary from case to case. The second scenario of multiple

punishment for the same harm is likely when the later jury sees no reason to deny a recovery to the plaintiff in front of it based on an earlier recovery by a different plaintiff.

When faced with such bleak and patently unfair potential outcomes due to a failure of courts to comply with *State Farm*, defendants are pressured to enter settlements at levels that would not be economically warranted if the courts correctly prohibited overlapping awards. Defendants are forced to settle a particular case regardless of the likelihood of losing because the threatened financial exposure in that case significantly exceeds the compensatory and punitive liability associated with that plaintiff's claim. The inordinate economic risks overdeter businesses from engaging in lawful commercial activities.

ARGUMENT

REVIEW IS WARRANTED BECAUSE THE RULING BELOW CONTRIBUTES TO AN ON-GOING DIVISION IN THE LOWER COURTS AND INCREASES THE RISK OF UNCONSTITUTIONALLY EXCESSIVE PUNITIVE DAMAGES, ARBITRARY DEPRIVATION OF PROPERTY, AND MULTIPLE PUNISHMENTS

Review by this Court of the decision below, which sustained a \$50 million punitive damages award more than nine times larger than the substantial compensatory damages of \$5.5 million also awarded, and did so by relying on alleged harm to persons not before the court, i.e., nonparties, would permit the Court to correct two significant errors. These errors are being made in a number of lower courts in their efforts to apply the prohibition under the Due Process Clause of the Fourteenth Amendment against "grossly excessive or arbitrary" punitive damages awards. *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

In the last 15 years, this Court repeatedly has provided guidance to the lower courts about application of the demanding standards of the Due Process Clause to the virtually infinite array of factual situations in which juries

award punitive damages. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Nevertheless, there remains a marked conflict among courts in their understanding and application of the principles established by this Court.

Since the Court's most recent decision on the subject in 2003 in *State Farm*, 538 U.S. at 418, almost 200 federal and state court decisions have purportedly applied the three guideposts analyzed in *State Farm* to determine whether particular punitive damages awards were unconstitutionally excessive.

Unfortunately, various courts, including the court below, have disregarded the clear instructions in *State Farm* about how to apply the first and second guideposts, which involve "the degree of reprehensibility of the defendant's misconduct" and "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." *Id.* at 418.³ These errant decisions undermine this Court's efforts to effectuate the Due Process Clause's assurance that defendants are not subject to grossly excessive or arbitrary awards and are given "fair notice not only of the conduct that will subject [them] to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 417 (quoting *Gore*, 517 U.S. at 574).

³ Like the decision below, most of these cases do not focus on the third guidepost regarding "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases," 538 U.S. at 418, which this brief also does not address.

A. The Decision Below Joins A Growing Line Of Cases That Ignore *State Farm's* Holding And Adopt A Single-Digit Safe Harbor, Regardless Of The Substantiality Of The Compensatory Damages

1. In the two and a half years since this Court issued its decision in *State Farm*, the greatest disagreement among lower courts reviewing punitive damages awards for constitutional excessiveness concerns the application of the second guidepost. The courts do not agree on the proper application of the directive to consider the ratio between the compensatory damages awarded to the plaintiff and the punitive damages awarded. These conflicting rulings may reflect a hostility to the substantive standards established by the Court or may result from a misunderstanding of them. In either event, the only means for reconciling the differences and establishing substantial uniformity in state and federal courts across the country is for this Court to take up the issue and ensure that courts (particularly those reviewing jury verdicts arising out of California) follow the dictates of *State Farm*. Absent further intervention by this Court, the divergence among and between the conduct of state and federal courts and this Court's holding will only widen further. See *State Farm*, 538 U.S. at 431 (Ginsburg, J., dissenting) (noting that "the Court 'work[s] at this business of checking state courts alone,' unaided by the participation of federal district courts and courts of appeals") (brackets omitted).

State Farm held that the permissible ratio of punitive to compensatory damages varies inversely with the amount of compensatory damages awarded to the plaintiff. The Court first declared that "few awards exceeding a single-digit ratio between punitive and compensatory damages" will "satisfy due process." 538 U.S. at 425. And it restated the Court's conclusion in *Haslip*, 499 U.S. at 23-24, emphasizing that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." 538 U.S. at 425.

Only where "a particularly egregious act has resulted in only a small amount of economic damages" to the plaintiff, is it the case that "ratios greater than those we have previously upheld may comport with due process." *Ibid.*

Conversely, and most relevant to this case but ignored by the court below, *State Farm* explained that when compensatory damages are "substantial," such as the \$1 million compensatory award in that case and the \$5.5 million compensatory award in this case, "then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Ibid.*; see *id.* at 429 ("the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages").

The court below is not alone in failing to follow the Court's instructions with regard to these ratios. Numerous lower courts ignore the four-to-one ratio that nears the constitutional line in typical civil litigation as well as the one-to-one guide for cases involving substantial compensatory damages. Those courts read the usual unconstitutionality of ratios that are greater than single-digit, instead, as a safe harbor for any lesser award.

2. Following *State Farm's* instruction, some courts have properly held that when substantial compensatory damages are awarded, a punitive damages award may not materially exceed the compensatory damages award. For example, in *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), the Eighth Circuit applied *State Farm* to reduce punitive damages against a tobacco company for a design defect claim to equal the compensatory damages, holding that absent "[f]actors that justify a higher ratio," "a ratio of approximately 1:1 would comport with the requirements of due process" given "the substantial compensatory damages award." 394 F.3d at 603 (remitting punitive damages award from \$15 million to \$5 million in light of \$4,025,000 compensatory damages); see also *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th

Cir. 2004) (remitting punitive damages award for racially discriminatory work environment from \$6 million to \$600,000, equal to the compensatory damages).⁶

Indeed, the appellate court below expressly acknowledged that "most cases addressing punitive damages in the context of an award of compensatory damages exceeding \$1 million have found" low single-digit ratios "more appropriate." Pet. App. 65a-66a. But instead of following those courts and this Court's reference points of a four-to-one ratio in typical cases and a one-to-one ratio in cases of substantial compensatory damages, the court below followed a line of decisions that ignore *State Farm*. These courts deem punitive damages awards not excessive so long as the ratio does not exceed single digits, regardless of the substantiality of the compensatory damages. By treating any single-digit ratio as a safe harbor, these courts fail to engage in the "[e]xacting appellate review" required by *State Farm*, 538 U.S. at 418.

The Ninth Circuit, for example, has generally refused to read *State Farm* to require any special justification to sustain a punitive damages award materially greater than a substantial compensatory award so long as the ratio does not reach double digits. "We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003), *cert. denied*, 541 U.S. 902 (2004); *see also Greenberg v. Paul Revere Life Ins. Co.*, 2004 WL 74630, at *2 (9th Cir. Jan. 12, 2004) (sustaining \$2.4 million punitive damages award, 4.4 times larger than compensatory

⁶ Even a one-to-one ratio of punitive damages to compensatory damages does not provide a safe harbor from a challenge of unconstitutional excessiveness in all circumstances. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63-64 (2d Cir. 2004) (vacating judge-imposed punitive damages award of \$2.1 billion, an amount equal to the compensatory damages award, for further consideration of, *inter alia*, "the extent to which a punitive award is needed to deter"), *cert. denied*, 125 S. Ct. 2270 (2005).

damages, because it is "well within the 'single digit ratio' that marks the outer limits of permissible disparities" under *State Farm*).

Further, the Ninth Circuit has interpreted *State Farm* to allow "a ratio of up to 4 to 1 [to] serve[] as a good proxy for the limits of constitutionality," even when "there are significant economic damages and * * * [the] behavior is not particularly egregious." *Planned Parenthood v. American Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005). Thus, that court has held that "*State Farm's* 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangerter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1015 (9th Cir.), cert. denied, 542 U.S. 939 (2004).⁶

In addition to the decision below, other California state appellate decisions have engaged in the same misreading of *State Farm*. Thus in *Maya B. v. Vogel*, 2004 WL 551325 (Cal. Ct. App. Mar. 22, 2004), the court of appeal held that a punitive damages award of \$1.6 million was "not in itself excessive" despite the fact that it was "two times the amount of compensatory damages" because "the single-digit multiplier was well within the discretion of the jury and trial court." *Id.* at *13; see *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 (Cal. Ct. App. 2003) (sustaining multimillion dollar punitive damages award that was more than five times the compensatory damages award for wrongful death suits arising out of rollover accident). Appellate courts from other States have likewise reached the same erroneous result and sustained large single-digit ratios without explanation. See, e.g., *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, 2005 WL

⁶ Other federal courts have likewise made the same analytic error of viewing single-digit ratios as a safe harbor even when the plaintiff was awarded substantial compensatory damages. See, e.g., *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003); *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003); *Chicago Title Ins. Corp. v. Magnuson*, 2005 WL 2373430, at *11 (S.D. Ohio Sept. 26, 2005).

2043633, at *2, *6 (Ky. Aug. 25, 2005) (sustaining \$2.5 million punitive damages award in favor of a defamed corporation that was five times the \$475,000 compensatory damages award).

3. The California Court of Appeal's decision below disparaged the relevance of the substantial amount of \$5.5 million in compensatory damages awarded to the plaintiff here, asserting that a larger amount of compensable injury does not entitle a defendant to receive what the court viewed as greater due process protection. Pet. App. 68a. In reaching that conclusion, that court ignored the relationship between compensatory and punitive damages acknowledged by this and other courts and disregarded the fact that the substantial, but not excessive, punitive damages allowed under a proper reading of *State Farm* can sufficiently deter and punish defendants.

In *State Farm*, this Court held that at least one component of compensatory damages, those awarded for emotional distress, "already contain this punitive element" by their nature. 538 U.S. at 426. As explained in one particularly scholarly district court opinion, all compensatory damages "possess a deterrent and punitive aspect," because "insofar as the compensatory award reflected some measure of imprecision and uncertainty always inherent in computations of damages, *** Defendants must bear the risk of that deficiency, a burden that constitutes a built-in deterrent aspect of compensatory damages." *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 424, 451 (S.D.N.Y. 2003), *rev'd on other grounds*, 412 F.3d 82 (2d Cir. 2005).

The decision below also disregarded the fact that, in an absolute sense, punitive damages that are equal to compensatory damages will be substantial whenever the compensatory damages are substantial, and thus are likely to serve their legitimate deterrent and punitive functions at that level. In this case, a punitive damages award equal to the extraordinary \$5.5 million compensatory damages awarded a single plaintiff can hardly be viewed as insubstantial. See *Williams*, 378 F.3d

at 799 (reducing punitive damages award to equal substantial compensatory damages award and noting that “[s]ix hundred thousand dollars is a lot of money”); *Watson v. E.S. Sutton, Inc.*, 2005 WL 2170659, at *19 (S.D.N.Y. Sept. 6, 2005) (reducing punitive damages award from \$2.5 million to \$717,000, which was approximately 50% of the compensatory damages award because “the amount is substantial enough to deter, while not being unduly burdensome”). By contrast, a jury decision to augment many times over a substantial compensatory damages award (like the initial jury award of \$3 billion in punitive damages in the instant case before judicial review) serves as a “telltale sign[]” that the jury’s verdict “may have been tainted by the jury having given undue weight to secondary considerations such as Defendants’ wealth, or to impermissible factors such as prior ‘dissimilar acts, independent from the acts upon which liability was premised,’ or Defendant’s affiliations with large and rich parent companies or out-of-state businesses.” *TVT Records*, 279 F. Supp. 2d at 451 (footnote and citations omitted).

B. The Decision Below Ignores *State Farm*’s Holding And Rationale By Upholding A Punitive Damages Award Based On Alleged Harms To Individuals Not Parties To The Case

1. The error of the California Court of Appeal below in applying the single-digit safe harbor is compounded by that court’s failure to apply correctly the first *State Farm* guidepost, which requires an assessment of the degree of reprehensibility of the defendant’s conduct. The court below allowed alleged harms to persons who were not before the trial court to form part of the basis for the punitive damages award.

But this Court made clear in *State Farm* that not only does the Due Process Clause impose territorial limits on the conduct that may be considered by a jury, but also basic notions of procedural due process preclude a jury from awarding punitive damages for harm caused to

persons who are not parties to the particular action. "Due process," the Court explained, "does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423; see *id.* at 421 ("[a]ny proper adjudication of conduct that occurred * * * to other persons would require their inclusion").

Yet that is precisely what occurred in this case. The Court of Appeal plainly relied on harm to other individuals, both smokers and non-smokers, in assessing reprehensibility but declined to require respondent to identify the specific individuals harmed, to demonstrate that those individuals were harmed by the same punishable conduct that underlay respondent's harms, or to establish that petitioner would be legally liable to those particular individuals. Pet. App. 63a-64a. In a similar situation arising in the Eighth Circuit, Judge Bye concurred in the invalidation of a punitive damages award against a tobacco company because "such evidence can not be considered when determining the amount of punitive damages for the specific harm suffered by a plaintiff." *Boerner*, 394 F.3d at 606 (Bye, J., concurring in result).

2. This due process limitation on imposing punishment for unadjudicated nonparty harms protects the rights of both defendants and the persons who are not before the court. If harm to nonparties could be considered in the cases of other individual plaintiffs, there is a substantial risk "of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *State Farm*, 538 U.S. at 423. As petitioner notes (Pet. 15), that is more than a hypothetical concern in the arena of tobacco litigation, where other California juries have awarded other individual plaintiffs substantial punitive damages awards against petitioner based on the same harms to the same set of nonparty individuals. In essence, consideration of harm to nonparties permits each individual plaintiff to recover on behalf of a class.

Even were defendants to get an offset in subsequent cases for earlier punitive damages awards, the exact basis for a prior punitive damages award will not always be clear. And even where it is proven that the defendant has already been punished severely for a course of conduct that included harm to the current plaintiff, there is no guarantee that the jury would agree to deny a different plaintiff who is before that jury in a different suit recovery of punitive damages simply because another plaintiff, in another court, already may have recovered such damages. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967) (Friendly, J.) ("whatever the right result may be in strict theory, we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare, even assuming the defendant would want such a charge, and still more unrealistic to expect that the jury would follow such an instruction or that, if they didn't, the judge would reduce the award below what had become the going rate").

Permitting an aggregate recovery followed by offsets in future cases could, moreover, unfairly deprive subsequent claimants of their own recoveries, including compensatory damages, either as a matter of law or because the pool of money available to those subsequent plaintiffs will be substantially reduced by the recovery of the initial plaintiff. Cf. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834-842 (1999) (discussing judicial responses to "limited fund" situations in class actions).

In all these circumstances, it is difficult, if not impossible, for defendants to rebut divergent charges about what happened to persons not before the court because of a myriad of evidentiary and practical issues. That is especially true given the constraints that trial courts must necessarily impose to make jury trials manageable. See 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 403.06[2] (2d ed. 2005).

Furthermore, even where a defendant prevails and establishes in an initial suit that it is not liable to a particular plaintiff, it is possible that such a defendant could lose the benefit of that victory against the same claim of misconduct as a basis for a punitive damages award in a later case because the prior verdict would not bind the later jury in its determination of punitive damages. Likewise, where a defendant prevails and is found not legally liable in some or most later suits involving similar claims there is no means for that defendant to recoup whatever portion of any earlier punitive damages award in another case was based on the alleged harm for which the defendant is later found not responsible.

The California Court of Appeal's decision to permit a jury to consider the effect of petitioner's conduct on persons not before the court essentially deputizes the presumably well-meaning but inexperienced individuals serving on the jury to act as *de facto* regulators with the authority to impose monetary penalties far greater than the State has authorized to be imposed by its own expert state regulators. Pet. App. 71a-72a. And, significantly, the jury's vote to award punitive damages in this case was not unanimous. The plaintiff mustered the bare minimum of votes necessary under California law, with a vote of 9 to 3. Yet those nine individuals voted to award the single plaintiff here \$3 billion in punitive damages against a single defendant. Even after the reduction to \$50 million, that punitive damages award will supplant all other state regulation in the eyes of defendants. *Cf. Geier v. American Honda Motor Co.*, 529 U.S. 861, 871 (2000) (describing effect of jury verdicts as akin to regulation).

When faced with the threatened risk of financial exposure from such a punitive damages award based on alleged harm to persons or entities not before the court, defendants are often subject to heightened (and unjustified) pressure to settle cases regardless of the likelihood of winning or losing the case on liability against a particular plaintiff. Such an approach "over-deter[s]" by leading potential defendants to spend more to prevent the

activity that causes the economic harm * * * than the costs of the harm itself," *Gore*, 517 U.S. at 593 (Breyer, J., concurring), and thus potentially "dissuad[es] activities commercially or socially beneficial on account of excessive caution induced among some corporate managers by fear of disproportionate punitive liability." *TVT Records*, 279 F. Supp. 2d at 429.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the Court should grant the petition.

Respectfully submitted,

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IN THE
Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,
v.

JUDY BOEKEN, AS TRUSTEE, ETC.,
Respondent.

On Petition for Writ of Certiorari to the
California Court of Appeal

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Amicus curiae addresses the following question only:

Whether, despite this Court's holding that the Federal Cigarette Labeling and Advertising Act (15 U.S.C. §§ 1331 *et seq.*) preempts state law "failure to warn" claims, States may use a "consumer expectations" theory to impose liability for failure to provide warnings about the dangers of smoking beyond the warnings mandated by Congress.

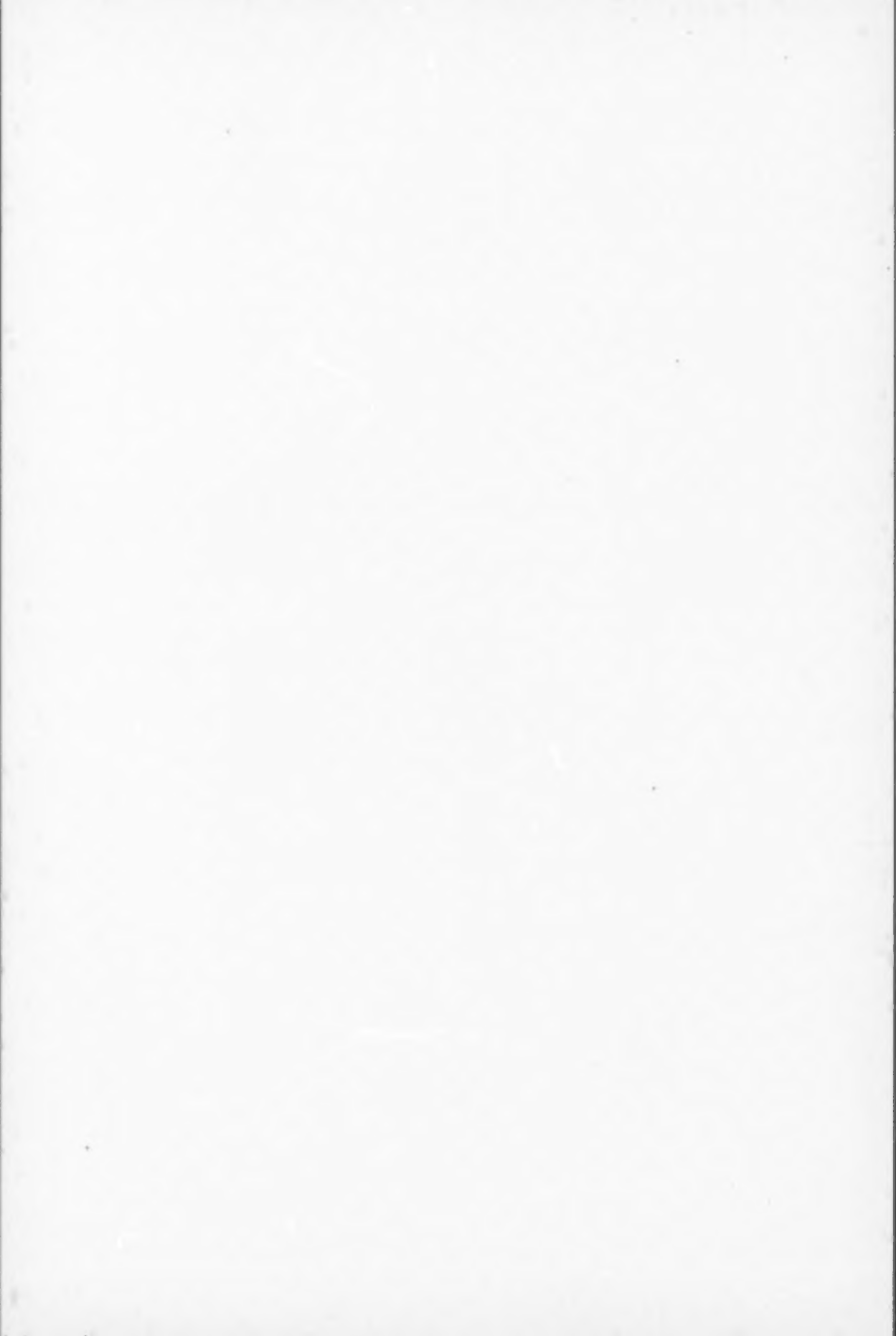


TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTERESTS OF <i>AMICUS CURIAE</i>	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
I. REVIEW IS WARRANTED TO PRESERVE THE UNIFORMITY PRINCIPLE THAT ANIMATES THE LABELING ACT AND SIMILAR FEDERAL STATUTES	6
II. REVIEW IS WARRANTED BECAUSE THE ISSUE RAISED HERE RECURS FREQUENTLY AND HAS DIVIDED THE LOWER COURTS ..	12
III. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PREEMPTION DECISIONS	16
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Aetna Health Inc. v. Davila</i> , 542 U.S. 200 (2004)	17
<i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1985)	17
<i>Arnold v. Dow Chemical Co.</i> , 91 Cal. App. 4th 698 (2001)	16
<i>Baldwin v. Alabama</i> , 472 U.S. 372 (1985)	16
<i>Barker v. Lull Engineering Co.</i> , 20 Cal. 3d 413 (1978)	3, 13
<i>Bates v. Dow AgroSciences LLC</i> , 125 S. Ct. 1788 (2005)	5, 11, 18
<i>Buckman Co. v. Plaintiffs' Legal Committee</i> , 531 U.S. 341 (2001)	10
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504 (1992)	5, 8, 9, 17-18
<i>In re Deep Vein Thrombosis Litigation</i> , 2005 U.S. Dist. LEXIS 4043 (N.D. Cal. 2005)	11, 12
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001)	8
<i>McCathern v. Toyota Motor Corp.</i> , 160 Ore. App. 201 (1999)	14
<i>Morales v. TWA</i> , 504 U.S. 374 (1992)	11
<i>Norfolk Southern Railway Co. v. Shanklin</i> , 529 U.S. 344 (2000)	11
<i>Papike v. Tambrands Inc.</i> , 107 F.3d 737 (9th Cir.), cert. denied, 522 U.S. 862 (1997)	15, 16
<i>San Diego Building Trades Council v. Gammon</i> , 359 U.S. 236 (1959)	9

	Page
<i>Soule v. General Motors Corp.</i> ,	
8 Cal. 4th 548 (1994)	14
<i>Witty v. Delta Air Lines, Inc.</i> ,	
366 F.3d 380 (5th Cir. 2004)	11

Statutes:

Airline Deregulation Act of 1978 ("ADA"),	
92 Stat. 1705 (1978)	11
49 U.S.C. § 41713(b)(1)	11

Federal Cigarette Labeling and Advertising Act	
("Labeling Act"), 15 U.S.C. § 1331 <i>et seq.</i>	<i>passim</i>
15 U.S.C. § 1331	7
15 U.S.C. § 1331(2)	10
15 U.S.C. § 1333	8
15 U.S.C. § 1334(a)	8, 17, 19, 20
15 U.S.C. § 1334(b)	8, 17, 19

Federal Insecticide, Fungicide, and Rodenticide	
Act ("FIFRA"), 7 U.S.C. § 136 <i>et seq.</i>	10, 15
7 U.S.C. § 136v(b)	10, 15

Federal Railroad Safety Act of 1970, 84 Stat. 971	
(1970), 45 U.S.C. § 20101 <i>et seq.</i>	11

Medical Device Amendments of 1976	10
21 U.S.C. § 360k(a)	10

Miscellaneous:

John F. Vargo, "The Emperor's New Clothes: The American Law Institute Adorns a 'New Cloth' for Section 402A Products Liability Design Defects – A Survey of the States Reveals a Different Weave," 26 U. MEM. L.REV. 493 (1996)	14
RESTATEMENT (SECOND) OF TORTS (1965), § 402A	13
RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) § 2	14

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. 05-594

PHILIP MORRIS USA,
Petitioner,

v.

JUDY BOEKEN, AS TRUSTEE, ETC.,
Respondent.

**On Petition for Writ of Certiorari to the
California Court of Appeal**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States.¹ WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts in cases involving preemption issues, to point out the economic

¹ Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

inefficiencies created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Bates v. Dow AgroSciences LLC*, 125 S. Ct. 1788 (2005); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *United States v. Locke*, 529 U.S. 89 (2000).

WLF is particularly concerned that individual freedom and the American economy both suffer when state law, including state tort law, imposes upon industry an unnecessary layer of regulation that frustrates the objectives or operation of federal regulatory programs. Such programs include the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), which is intended to promote uniformity in cigarette labeling/advertising regulation and to reinforce First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict commercial speech.

WLF believes that both of the issues raised by the Petition are worthy of the Court's review. Nonetheless, this brief focuses solely on the first Question Presented, regarding the California Court of Appeal's preemption ruling.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It is filing due solely to its interest in the important preemption issues raised by this case. WLF is filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Respondent Richard Boeken died of lung cancer after smoking, for more than 40 years, cigarettes manufactured by Petitioner Philip Morris USA ("PM USA") and its predecessors.

Before his death, he filed suit against PM USA seeking damages for common-law fraud and product liability. He argued, *inter alia*, that Marlboro Lights were not as safe as he and other ordinary consumers expected and thus that PM USA should be held strictly liable under a product liability theory.

The jury returned a general verdict in favor of Respondent, awarding \$5.5 million in compensatory damages and \$3 billion in punitive damages. The trial court reduced the punitive damages award to \$100 million but otherwise upheld the jury award. Pet. App. 155a-181a.

The California Court of Appeal reduced the punitive damages award to \$50 million but affirmed the liability verdict. *Id.* 1a-78a. Although Respondent had raised several product liability theories at trial, the Court of Appeal said that the verdict could be affirmed on basis of the "consumer expectations test." *Id.* 28a. The court explained, "The consumer expectations test is satisfied when the evidence shows that 'the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.'" *Id.* 28a-29a (quoting *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 429 (1978)). The court said that "substantial evidence" supported the finding that Marlboro Lights were a defective product under that test. *Id.* 28a. The Court said that "most smokers" believe that Marlboro Lights are safer than ordinary cigarettes because, when they are smoked the same way as ordinary cigarettes, less tar is inhaled (as measured by Federal Trade Commission-approved standards). *Id.* at 29a. The Court held that substantial evidence supported Respondent's claim that Marlboro Lights smokers generally inhale as much tar as smokers of ordinary cigarettes. Respondent's evidence suggested that that result is due to "compensation": the tendency of smokers to draw more smoke

into their lungs and to keep it there longer when smoking "light" cigarettes. *Id.*

The court rejected PM USA's contention that Respondent's claim under the consumer expectations test was preempted by the Labeling Act. *Id.* Although apparently conceding that the Labeling Act would have preempted any failure-to-warn claim raised by Respondent, the court said that Respondent's product liability claim was not preempted because "[p]roduct liability under a failure-to-warn theory is a distinct cause of action from one under the consumer expectation test." *Id.* The court also said that additional warnings could not have made Marlboro Lights any safer because "the only way to reduce the risk is to quit smoking." *Id.*

The California Supreme Court denied PM USA's petition for review on August 10, 2005.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to thousands of companies throughout the United States: whether their activities should be regulated on a uniform basis nationwide by the federal government, or whether they are subject to a different set of regulations in each State in which they operate. Through its adoption of a variety of statutes, Congress has made clear its intent that certain industries should be subject to uniform regulation with respect to what they should and should not say to consumers, and that State regulation of that subject matter be preempted. The decision below applied a very narrow reading to federal preemption and thereby threatens to undermine the national uniformity Congress sought to achieve. Review is warranted in light of the importance of this preemption issue to the ability of the businesses to operate on a nationwide basis.

Review is also warranted because of the frequency with which the Question Presented arises, under the Labeling Act and similar statutes. At least half of the 50 States apply some form of the "consumer expectations test" to determine whether a manufacturer can be held strictly liable in tort for manufacturing a defective product. In determining just what "consumer expectations" are, most of those States look to statements of the product manufacturer. The California Court of Appeal was correct that a product liability cause of action that proceeds under the "consumer expectations test" is a separate cause of action from a "failure to warn" cause of action; that is true both in California and elsewhere. But the Court of Appeal went on to conclude that because a "consumer expectations test" claim is a distinct cause of action, such a claim is not subject to the same federal preemption limitations as is a "failure to warn" claim. Pet. App. 29a. That position is a well-entrenched minority position, albeit it is one that has been rejected by a clear majority of State and federal courts that have considered the issue. Because the application of federal preemption provisions to state-law product liability claims applying the "consumer expectations test" is an issue that arises frequently and that has divided the lower courts, review is warranted to resolve that conflict.

Review is also warranted because the decision below is so clearly at odds with the decisions of this Court that have addressed federal preemption c'ases. In both *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Bates v. Dow AgroSciences LLC*, 125 S. Ct. 1788 (2005), the Court made clear that in determining whether a common law cause of action is one that Congress intended to preempt, courts should examine the common law duty being imposed by that cause of action. When, as here, the common law duty is one that Congress intended to bar States from imposing, the cause of action is preempted. The California Court of Appeal never engaged in

that analysis. Had it done so, it would have been forced to conclude that a judgment against PM USA based on application of the "consumer expectations test" effectively imposes on PM USA a duty to provide California consumers with additional warnings regarding health hazards associated with smoking Marlboro Lights. PM USA is forced to provide these warnings because if it wishes to continue to market Marlboro Lights in California, it must do something to bring consumer expectations regarding the safety of its product (which the jury deemed to be too high) into line with the product's actual safety level. The Labeling Act bars California from imposing any such duty. Review is warranted to correct that error, which threatens to undermine Congress's efforts to establish uniform cigarette labeling and advertising requirements throughout the country.

I. REVIEW IS WARRANTED TO PRESERVE THE UNIFORMITY PRINCIPLE THAT ANIMATES THE LABELING ACT AND SIMILAR FEDERAL STATUTES

In a wide variety of contexts, Congress has adopted legislation designed to protect consumers by mandating that businesses provide safety warnings regarding their goods and services – and also designed to ensure that business do not face a mishmash of nonuniform warning requirements from State regulators. The Labeling Act is one such statute. Review is warranted because of the importance to the business community of that uniformity principle and because the decision below threatens to undermine enforcement of that principle in the context not only of tobacco regulation but in other regulatory contexts as well.

By adopting the Labeling Act, Congress sought to ensure that the public would be "adequately informed" about the health risks associated with smoking by requiring every cigarette

package (and, later, by requiring every cigarette advertisement) to carry health warnings specified by Congress itself. At the same time, Congress also sought to "protect commerce and the national economy" to "the maximum extent consistent with [that] declared policy" by preserving the cigarette manufacturers' ability to advertise and label their products free from "diverse, nonuniform, and confusing" state and local regulations based on smoking and health. 15 U.S.C. § 1331.²

To give effect to this policy of national uniformity – protecting cigarette advertising and labeling while providing for the dissemination of government warnings about smoking – the Labeling Act contains an explicit preemption provision that provides:

² Section 1331, which declares the policy and purpose of the Federal Cigarette Labeling and Advertising Act, provides in its current form:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

(2) commerce and the nation economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). The Labeling Act further provides, "No statement relating to smoking and health, other than the statement required by [15 U.S.C. § 1333], shall be required on any cigarette package." 15 U.S.C. § 1334(a).

As the Court has noted, Congress passed the current form of the Labeling Act preemption provision in 1969, in the face of efforts at the state level to regulate and even ban cigarette advertising. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 515 & n.11 (1992) ("For example, the California State Senate passed a total ban on both print and electronic cigarette advertisements."). The Court has observed that, when Congress amended the Act in 1969-70, it substantially broadened the preemption provision. See *id.* at 520 ("Compared to its predecessor in the 1965 Act, the plain language of the 1969 Act is much broader."); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) ("Without question, the second clause is more expansive than the first; it employs far more sweeping language to describe the state action that is pre-empted."). Prior to the 1969 amendment, § 1334(b) had merely precluded state and local authorities from requiring any "statement relating to smoking and health . . . in the advertising of any cigarettes." As amended, the expansive language of the preemption provision does much more than prohibit state and local regulation of the content of cigarette advertising; it now precludes any state or local authority from passing "requirement[s] or prohibition[s] based on smoking and health . . . with respect to the advertising or promotion" of cigarettes. 15 U.S.C. § 1334(b).

Cipollone made clear that Labeling Act preemption applies to requirements/prohibitions imposed by the common law as well as by statutes and regulations:

The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we stated in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief."

Cipollone, 505 U.S. at 521 (plurality) (quoting *San Diego Building Trades Council v. Gammon*, 359 U.S. 236, 247 (1959)); see *id.* at 548-49 (Scalia, J., concurring in the judgment in part and dissenting in part).

The decision below has imposed on PM USA a common-law duty, if it wishes to continue to market Marlboro Lights in California, to eliminate any expectation among consumers in the State that smoking Marlboro Lights is less hazardous. It is difficult to conceive how PM USA can ensure that California juries will not continue to conclude that consumers have unrealistically high safety expectations for Marlboro Lights, other than by including additional health warnings in its labeling and advertising directed to Californians. But by requiring PM USA to provide such additional health warnings in order to allow it to continue to market its legal product in the State, California undercuts the uniformity principle animating the Labeling Act. By requiring additional health warnings within the State, California is potentially "imped[ing]" "commerce and the national economy" by imposing "diverse, nonuniform and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15

U.S.C. § 1331(2). Review is warranted to determine whether Congress intended to permit States to undermine the uniformity principle in this manner.

Other federal regulatory statutes contain preemption provisions that are designed to ensure national uniformity in regulation and are similarly threatened by the decision below. For example, in order to ensure nationwide uniformity in the regulation of medical devices, Congress broadly prohibited States from imposing "any requirement" on a medical device "which is different from, or in addition to, any requirement" imposed on the device by the federal Medical Device Amendments of 1976, and "which relates to the safety and effectiveness of the device." 21 U.S.C. § 360k(a). This preemption provision is fully applicable to State "requirements" imposed by the common law. *See, e.g., Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). Although § 360k(a) is generally understood to preempt common-law suits based on claims that the product label failed to include warnings not mandated by the federal Food and Drug Administration, the decision below suggests that § 360k(a) might not preempt product liability claims based on a "consumer expectations test" — thereby paving the way for non-uniform labeling requirements in States permitting such claims.

Similarly, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, imposes strict labeling requirements on pesticides and at the same time ensures national uniformity in requirements by providing that States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). The Court has construed this provision as preempting any common-law failure-to-warn claims to the extent that such claims effectively impose labeling requirements that are "in addition to or different

from" those required by FIFRA. *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005). The decision below jeopardizes that uniformity provision by suggesting that product liability claims against a pesticide manufacturer based on a "consumer expectations test" might not be preempted by § 136v(b).

Federal preemption provisions that govern regulation of service providers may be similarly affected. For example, the Federal Railroad Safety Act of 1970 (FRSA), 84 Stat. 971 (1970), 45 U.S.C. § 20101 *et seq.*, regulates the types of warning devices that railroads must install at railroad crossings. When warning devices are installed using federal funds and in conformity with regulations adopted pursuant to the FRSA, the statute preempts common-law failure-to-warn actions challenging the adequacy of those warning devices. *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000). The decision below suggests that other common-law actions might not be preempted even if they would have the effect of creating warning requirements in addition to those mandated by FRSA regulations.

Similarly, the Airline Deregulation Act of 1978 ("ADA"), 92 Stat. 1705 (1978), mandates a uniform national policy of deregulating the airline industry by preempting virtually all State regulations relating to "rates, routes, or services." 49 U.S.C. § 41713(b)(1). Thus, the Court ruled in *Morales v. TWA*, 504 U.S. 374, 383 (1992), that the ADA "express[ed] a broad preemptive purpose" and that States were not free to regulate advertising regarding airfares. More recently, lower federal courts have ruled that the ADA and the Federal Aviation Act ("FAA") preempt State common-law failure-to-warn claims that airlines should warn passengers on every flight that they should walk about the cabin to avoid developing deep vein thrombosis. *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004); *In re Deep Vein Thrombosis Litigation*, 2005 U.S.

Dist. LEXIS 4043 (N.D. Cal. 2005). As the judge hearing the latter case (a multi-district proceeding) explained:

[S]tate-law suits based upon a failure to warn of DVT would most certainly lead to non-uniformity (anathema to the FAA), for each time a state jury sustains a failure to warn challenge, airline defendants would be forced to amend their pre-flight warnings to avoid future liability. Moreover, such state law verdicts could be inconsistent among themselves.

Id. at *44. The decision below suggests that while failure-to-warn claims against airlines may be preempted by the ADA and FAA, other common-law claims might not be preempted even if they have the effect of imposing on airlines a duty to provide additional health warnings to their passengers.

In sum, the decision below potentially affects a broad range of businesses that currently enjoy federal statutory protection against nonuniform State regulations. Review is warranted in light of the potentially broad impact of the decision below on this uniformity principle.

II. REVIEW IS WARRANTED BECAUSE THE ISSUE RAISED HERE RECURS FREQUENTLY AND HAS DIVIDED THE LOWER COURTS

Review is also warranted because the lower courts are deeply divided over whether a product liability claim based on the "consumer expectations test" is preempted by federal law whenever an equivalent failure-to-warn claim is preempted. Because at least 25 of the 50 States apply some form of the "consumer expectations test" to product liability claims, this issue has arisen often in the past and can be expected to arise

with regularity in the future. The Court should grant review to resolve this conflict.

Use of the "consumer expectations test" in strict product liability claims generally derives from Comment i of § 402A of the RESTATEMENT (SECOND) OF TORTS (1965), which provides the following definition of an "unreasonably dangerous" product:

The article sold must be dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

In the years following 1965, the great majority of States adopted some variant of this definition, which came to be known as the "consumer expectations test." In 1978, in the course of adopting much of § 402A, the California Supreme Court held:

[A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) in light of the relevant factors [discussed more fully in the opinion], the benefits of the challenged design do not outweigh the risk of danger inherent in the design.

Barker v. Lull Engineering Co., 20 Cal. 3d 413, 418 (1978).³

³ The second of the two methods outlined by *Barker* for establishing a design defect – generally referred to as a risk-utility analysis – is not at issue in this case. The sole basis upon which the Court of Appeal upheld the product liability award in this case was use of the "consumer expectation test" – the first of the two methods outlined by *Barker*. Pet. App. 28a.

Just how juries should go about determining how safely an ordinary consumer would expect a product to perform has been a matter of considerable controversy in the ensuing decades. Some commentators have concluded that the only way to determine what consumers should reasonably expect from a product is to assess the product's risks and benefits in light of potential alternative designs. Because that formulation sounds remarkably similar to a risk-utility analysis, the drafters of the Restatement (Third) of Torts have suggested doing away with the "consumer expectations test" as a separate basis for recovery in a product liability action. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, Reporters Note, cmt. d (1998).

Nonetheless, a large number of States adhere to the "consumer expectations test." One recent survey of state tort law placed the number of such States at 25. See John F. Vargo, "The Emperor's New Clothes: The American Law Institute Adorns a 'New Cloth' for Section 402A Products Liability Design Defects - A Survey of the States Reveals a Different Weave," 26 U. MEM. L.REV. 493, 951 (1996). See also *McCathern v. Toyota Motor Corp.*, 160 Ore. App. 201, 208 n.5 (1999) (listing cases from numerous States adopting the "consumer expectations test"). As the decision below indicates, California is one of those States.⁴

⁴ More recent California Supreme Court decisions indicate that a manufacturer may be held liable under the "consumer expectations test" only if the product has a relatively simple design. If the product is more complex, the court concludes that the ordinary consumer is incapable of determining whether the product is as safe as it should be; in such cases, expert testimony is required regarding risk-utility analysis and whether alternative designs would render the product safer. *Soule v. General Motors Corp.*, 8 Cal. 4th 548 (1994).

Given the widespread acceptance of the "consumer expectations test" as one method of establishing a product liability claim, it is hardly surprising that the issue presented in this case arises frequently: are product liability claims proceeding under the "consumer expectations test" preempted by federal law when analogous failure-to-warn claims are preempted? If, as here, a product liability claim does not proceed on the basis of a risk-utility analysis, then determining consumer expectations requires, of necessity, an examination of statements a manufacturer has made regarding its product. The more health and safety warnings a manufacturer has made regarding its product, the less viable is a claim that a product failed to perform as safely as an ordinary consumer would expect. Accordingly, if federal law preempts a failure-to-warn claim, there is reason to conclude that the same federal statute may preempt a product liability claim proceeding under the "consumer expectations test," since the latter claim presupposes that the manufacturer allowed consumer expectations to rise too high by failing to give sufficient warnings regarding health and safety risks.

As the Petition well documents, federal and State courts are irrevocably divided over this issue. WLF will not repeat here all the relevant cases cited in the Petition. It bears repeating, however, that California state and federal courts are on opposite sides of this issue. The Ninth Circuit held in *Papike v. Tambrands Inc.*, 107 F.3d 737 (9th Cir.), cert. denied, 522 U.S. 862 (1997), a product liability claim proceeding under the "consumer expectations test" against a medical device manufacturer, that the claim failed as a matter of law because the manufacturer had complied fully with all federally mandated warning requirements. 107 F.3d at 743 ("To rule otherwise would allow the anomalous circumstance that a consumer is entitled to expect a product to perform more safely than its government-mandated warnings indicate."). Four years later,

the California Court of Appeal explicitly declined to follow *Papike* in a FIFRA case. The court ruled that even though 7 U.S.C. § 135v(b) preempted the plaintiffs' failure-to-warn claim against pesticide manufacturers and distributors, it did *not* preempt the plaintiffs' product liability claim proceeding under the "consumer expectations test." *Arnold v. Dow Chemical Co.*, 91 Cal. App. 4th 698, 716-717 (2001). The court below relied on *Arnold* in concluding that Respondent's product liability claim was not preempted by the Labeling Act.

As PM USA notes, granting review to resolve a conflict among the lower court is particularly appropriate when the conflicting decisions are from federal and state courts within the same State. Pet. 10 (citing *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985)). Unless that conflict is resolved, whether a California product liability claim proceeding under the "consumer expectations test" is preempted by federal law will often depend entirely on whether a defendant is successful in removing the case from state to federal court.

In sum, the preemption issue raised by the Petition is one that has deeply divided state and federal courts. That conflict will remain and will arise with regularity unless the Court grants review to resolve the conflict.

III. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PREEMPTION DECISIONS

Review is also warranted because the decision below is so clearly at odds with the decisions of this Court that have addressed federal preemption claims. The California Court of Appeal's rationale for rejecting PM USA's preemption claim amounted to little more than an assertion that Respondent's product liability claim proceeding under the "consumer

expectations test" was a distinct cause of action from a failure-to-warn claim (which the court apparently conceded was preempted under the Labeling Act). Pet. App. 29a.

That California law deems Respondent's product liability claim as one distinct from a failure-to-warn claim simply misses the thrust of preemption analysis under the Labeling Act. The Court has made clear that whether a common-law claim is preempted by federal law does not depend on the name assigned to that claim:

[Distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would "elevate form over substance and allow parties to evade" the preemptive scope [of federal law] simply "by relabeling their contract claims as claims for tortious breach of contract."

Aetna Health Inc. v. Davila, 542 U.S. 200, 214 (2004) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)).⁵

Rather, the question that must be answered is one that the California Court of Appeal never addressed: does the common-law duty imposed on PM USA as a result of the judgment below amount to a "requirement or prohibition based on smoking and health" imposed "with respect to the advertising or promotion of any cigarettes," 15 U.S.C. § 1334(b), or a "statement relating to smoking and health . . . required on any cigarette package"? 15 U.S.C. § 1334(a). As the Court explained in *Cipollone*:

⁵ In *Aetna Health*, the Court ruled unanimously that the plaintiffs' causes of action were preempted by the preemption provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001. The Court deemed it irrelevant, for purposes of deciding the preemption issue, that the plaintiffs had characterized their action as one sounding in tort rather than contract. *Id.*

The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion," giving that clause a fair but narrow reading.

Cipollone, 505 U.S. at 523-24 (plurality). See also *Bates*, 125 S. Ct. at 1799 ("The proper inquiry calls for an examination of the elements of the common law duty at issue.").

The common-law duty imposed on PM USA as a result of the judgment in this case is relatively clear: if it wishes to continue to market Marlboro Lights in California, it must do something to bring consumer expectations regarding the safety of its product (which the jury deemed to be too high) into line with the product's actual safety level. PM USA is, of course, already doing quite a bit to lower consumer expectations of safety: every Marlboro Lights package label and every advertisement for Marlboro Lights contains one of the strong health warning mandated by the federal government. If, as Respondent contends, consumers continue to believe that "light" cigarettes (*i.e.*, those for which less tar is inhaled when smoked in the same way as ordinary cigarettes) are significantly safer than ordinary cigarettes, then PM USA's only means by which it can reduce consumer expectations is to include additional health warnings on its package labels, advertisements, and other promotional materials.⁶ Certainly, neither Respondent nor the Court of Appeal suggested an

⁶ Not even the Court of Appeal contends that making Marlboro Lights significantly safer is a viable means of bringing product safety into line with consumer expectations. The Court of Appeal quoted one expert witness as testifying that "the only way to reduce the risk is to quit smoking." Pet. App. 29a n.16.

alternative means by which PM USA could lower consumer expectations.

Accordingly, the common-law duty imposed on PM USA by virtue of this lawsuit is preempted by the Labeling Act; that duty consists of a requirement that it provide additional health warnings on its package labels and advertisements. Such a requirement is preempted by 15 U.S.C. § 1334(a) and (b).

In an effort to distinguish between Respondent's product liability claim and a failure-to-warn cause of action, the Court of Appeal asserted: "Since smokers do not know they compensate, a warning may not make the product any safer." Pet. App. 29a. That assertion illustrates the Court of Appeal's fundamental misunderstanding of the preemption issue raised by the Labeling Act. Whether one is asserting a failure-to-warn cause of action or a product liability cause of action that is proceeding under the "consumer expectations test," the point of a warning requirement is not to make the product safer, but rather to alert the consumer that the product is not as safe as he or she might otherwise believe. Imposing a common-law requirement on cigarette manufacturers that they provide additional health warnings on California packaging and advertisements (e.g., "WARNING: Due to the tendency of smokers to 'compensate' by drawing more smoke into their lungs, Marlboro Lights are no safer than ordinary cigarettes and in some instances may be more dangerous") would undoubtedly serve to lower consumer health expectations regarding light cigarettes and thereby bring PM USA into compliance with the duties imposed under California product liability law. But any such requirement is a clear violation of the Labeling Act, which prohibits States from imposing any "requirement . . . based on smoking and health . . . with respect to the advertising and promotion" of cigarettes, 15 U.S.C. § 1334(b), or requiring that any "statement relating to smoking and health" be placed on the

cigarette package, 15 U.S.C. § 1334(a), and would undermine the national uniformity principle embodied in the Labeling Act.

In sum, review is also warranted because the decision below is in clear conflict with the decisions of this Court.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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